

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT:
NEW-ORLEANS, DECEMBER, 1832.

BRUCE vs. STONE ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

In all cases where facts are alleged by defendants in avoidance of rights claimed by plaintiffs, the latter are supposed to deny all such allegations.

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The presumption resulting from a similarity of names, unsupported by other circumstances, is not proof of the identity of a slave.

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The verdict of a jury which is not a forced or improbable deduction from the evidence adduced, will not be disturbed by this court.

In this case the plaintiff sought to recover of the defendants, jointly and severally, the sum of five hundred dollars, being the price of a slave named Charles, sold by plaintiff to defendants, by public act, on the 15th of May, 1830. The price was made payable in ninety days, in good merchantable ash wood, or in cash, at the option of the vendees, either of which after the expiration of the specified period, the defendants refused to pay.

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The defendants admitted the sale, and alleged that said slave was not free from the vices and maladies prescribed by law, and against which plaintiff had warranted him; that said slave died four days after the sale, of a disease which the plaintiff knew the slave had at the time of the sale; that said slave was a runaway at the time of sale.

On the trial, the testimony of Robert Montgomery, a witness for defendant, taken under commission in this case, showed that Taylor, one of the defendants, came to his plantation and told him the black boy then on board Taylor's sloop belonged to the defendants; that deponent did not know whether it was the same negro purchased from the plaintiff; that said negro died in one or two days afterwards, and he believes sometime about the middle of May, though every possible care had been taken to save him.

Simon Meilleur, another witness of defendants, testified that he was the keeper of the police jail in the city of New-Orleans, that he knew a negro belonging to plaintiff, named Charles, said negro was repeatedly in said police jail, was once or twice among the chain negroes, fell sick the last time he was among them, and was removed by plaintiff as appears by the said police jail books.

Upon this evidence the jury found for the defendants, and judgment having been rendered accordingly, the plaintiff moved for a new trial, on the ground that the verdict and judgment were contrary to law and evidence. The court below overruled this motion, and the plaintiff appealed.

Macready, for appellant, made the following points:

1. There is error in the verdict of the jury, and the judgment the court *a quo*, inasmuch as there is no proof in the record to show that the negro who died on Montgomery's plantation was the same, for the price of which the present suit was instituted.
2. The plaintiff's case is fully made out by the notarial act attached to his petition, but the defendants have totally fail-

ed to show, that the negro man *Charles*, mentioned therein, died of any redhibitory vice, or that he died at all.

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L. C. Duncan, for appellees.

The evidence supports the verdict and judgment of the court, whence the appeal is taken.

The opinion of the court was delivered by *MATHEWS, J.*

In this case the plaintiff sues to recover the price of a slave named *Charles*, which he sold to the defendants on a credit of ninety days.

Their answer admits the purchase and agreement to pay the price as alleged by the petitioner. But they claim a release from their obligation to pay, in consequence of redhibitory vices and defects in the slave sold to them, and also on account of fraud committed by the vendor in concealing from them the circumstance of the slave being afflicted with a disease at the time of sale, called dysentery, and of which he died about four days after.

The cause was submitted to a jury, who gave a verdict for the defendants, and judgment being thereon rendered, the plaintiff appealed. Previous to the appeal, a motion was made for a new trial, not based on any specific grounds; but only on the general allegations, that the verdict and judgment were contrary to law and evidence. His counsel in this court assumes in his points, as filed, two grounds of error in the judgment rendered by the court below. First, That the defendants did not support their allegations in avoidance of the contract of sale by sufficient evidence to identify the slave *Charles*, who died, as being the same sold to them by the plaintiff. Second, That the record affords no proof of any redhibitory defects, &c.

The last error alleged by the appellant seems to be unsupported by the facts of the case. The testimony of the keeper of the police jail raises a violent presumption, that the slave in question, was in the habit of running away from

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his master immediately previous to the sale. But in all events, the fraud practised by the seller in concealing the disease of which the slave died, and so soon after the sale, would be a good cause of redhibition.

The evidence with regard to identity (as admitted by the counsel for the appellees,) is by no means conclusive, and the only question which remains for us to examine is, whether it be such as can justify the verdict of the jury under all the circumstances.

The only facts clearly established by the testimony in relation to this point in the cause, are, that the plaintiff sold to the defendants a negro man slave named Charles, on the 15th of May, 1830, and that about the middle of the same month a negro slave named Charles died whilst in the possession of the latter, at the plantation of R. R. Montgomery, on the Mississippi, below New-Orleans. Absolute or mathematical certainty is attainable only in abstract sciences. The highest degree of it, in relation to natural appearances, and the ordinary transactions of men, is what is called moral certainty, depending mainly on probabilities consequent from facts, and these probabilities vary from very slight to such as are so strong as to produce full conviction and persuasion on rational minds. The first rule of legal evidence is that the best which the nature of a case admits, shall be produced in support of facts alleged by one party to a suit, and denied by the other. The practice of our courts of original jurisdiction, does not admit of replications, consequently in all cases where facts are alleged by defendants in avoidance of rights claimed by plaintiffs, the latter are supposed to deny all such allegations, or at least all material to their defence against the pretensions of their adversaries; being in this respect in the situation of defendants. The denial of the plaintiff in the present instance, must be presumed to extend to the defects of the slave as alleged by the defendants, and also to his identity as being the same sold by him to them. The question then arises, whether in a legal point of view the evidence supports the fact of identity. The rule of evidence above stated has reference rather to the admissibility of tes-

In all cases where facts are alleged by defendants in avoidance of rights claimed by plaintiffs, the latter are supposed to deny all such allegations.

timony, than the effect which may be produced by it when admissible in relation to the conviction, belief or persuasion of the truth of facts alleged in the minds of those called on to judge and determine on such facts. Men free and men who are slaves, (perhaps not much in accordance with the dignity of human nature,) are distinguished, one from another, by names arbitrarily given, as well as by their different physical and moral qualities; but the same name is often given to several individuals, whilst the bodily and mental structure of each separate individual is distinguishable from all others. In the present case, the only prominent circumstance proven of the identity of the slave which died, with the one which was sold, is the name. Although his death, so soon after the sale, might have deprived the defendants of the most certain means of identifying him, yet there were others in their power, such as showing by evidence that they were owners of but four slaves previous to his death, that they owned no other called Charles at the time when the slave in question died; that they were traders in wood, and that their course of trade was from New-Orleans down the river to the plantations below the city, and up again, &c., carried on in a small vessel, such as that on board of which the slave was employed. These additional proofs would certainly have strengthened the fact of identity resulting from the similarity of names. But without them, can we take on ourselves to say that the jury came to an incorrect conclusion on the facts of the cause as proven to them? In answer to this question, it may be stated, confidently, that the jurors were the proper judges in this matter, and being such, great weight must be accorded to their verdict. Yet, if we, (who from the constitution of this court, must also judge of facts,) on an impartial and legal investigation of the evidence, feel ourselves bound to come to a different conclusion, the appellant ought to be relieved. The prominent facts proven as above stated, are that a negro man slave named Charles, was sold by the plaintiff to the defendants on the 15th of May, 1830, and that about four days after, a negro man slave named Charles, died in the possession of the latter, of a disease, which, from the nature of

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the human constitution, he most probably had on or before the date of the sale. From this simple statement, it cannot be truly said that the verdict of the jury is contrary to evidence. This we deem, may be considered as weak, and possibly other men judging on it might have come to a different conclusion, but we are unable to say positively that the conclusion of those judges of the facts, was incorrect; it has the support of strong probability, a proper basis of conviction, belief and persuasion, in human affairs.

The doctrine which recognizes names as means of identification, in disputes about slaves, is laid down in the opinion of this court, pronounced in the case of *Johnson vs. Field*, reported in 6 N. S. p. 635. That was a suit to recover slaves in the possession of the defendant; they were named in the petition and their identity was not denied, either expressly or impliedly in the answer: a title was set up as derived from a source different from that alleged by the plaintiff. The decision of the Supreme Court, though contrary to that of the District Court, we believe to be correct. In the present case there is an implied denial of identity as to the slave whose price is sued for, and the one which the defendants allege to have died in their possession. But according to the facts as proven, (although they might have been strengthened by *adminicules*, probably within the power of the defendants) we are of opinion, that the finding of the jury was not contrary to evidence, or in other words, that it was not a forced or improbable deduction from the evidence adduced.

The verdict of a jury which is not a forced or improbable deduction from the evidence adduced will not be disturbed by this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

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SALTER vs. HURST.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Whether the general rules of maritime salvage are applicable to the raising of a vessel and cargo sunk in the Mississippi River.—*Query?*

One person may claim the benefit of contract for salvage made by another respecting the cargo in a vessel of which they are the joint owners, and in the raising of which from the bottom of the river, they share equally in labor and expense.

Where no fraud or gross negligence is chargeable on the hirer, the owner must sustain the damage resulting from the loss of the thing hired.

This action was brought to recover one half the salvage which the defendant received for raising the cargo of a brig sunk at the mouth of the Mississippi river. The plaintiff avers, that the steamboat used in raising the brig was worked on joint account of himself and defendant. The latter, in his answer, denies this averment.

The cause was tried in the court below, and judgment was rendered for the plaintiff. The defendant, after an unsuccessful attempt to obtain a new trial, appealed.

Preston, for appellants, contended:

That there was no evidence that the steamboat was worked on joint account. Plaintiff was only concerned with the brig, and therefore should not share in the salvage for raising the cargo. Plaintiff run no personal risks or made any personal sacrifices. See the cases of the *Harmony* and *Arethusa*, cited in *Lex Mercatoria*.

Eustis, for appellee, made the following points:

1. The judgment must be affirmed, because the evidence shows, that at the time the salvage was earned, the steamboat

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was worked on the joint account of the plaintiff and the defendant.

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2. That plaintiff expended his labor in earning the salvage.

3. That plaintiff paid his share of the hire of the boat.

The opinion of the court was delivered by **MATHEWS, J.**

In this case, the plaintiff claims one half of the profits awarded to the defendant as salvage for raising the cargo of a brig called the Trent, which was sunk at the Balize. The cause was submitted to a jury in the court below, who, by their verdict, sustained his claim; and judgment being accordingly rendered, the defendant appealed.

The facts of the case, as established by the testimony, show that the brig and her tackle whilst sunk, were purchased for the joint account of both plaintiff and defendant; and as a means of raising her, they employed on joint account the steamboat Florida; that on raising the vessel the cargo was also raised, being then in her, a necessary consequence of success in their main undertaking, and seems to have been foreseen by the defendant, who contracted with certain persons (who had purchased the cargo in its lost situation,) for the payment of salvage, to an amount such as should be settled and awarded by the port wardens of New-Orleans, which was two thousand three hundred and thirty-two dollars and fourteen cents; and the whole of this sum was afterwards received by the defendant.

In relation to the facts of the case, the counsel for the appellant contends, that the evidence is too weak and inconclusive to establish the hiring and use of the steamboat to have been on joint account of the purchasers of the brig. This fact, we, however, believe to have been fairly inferred by the jury, by the settlement made between the parties relative to the sale from the defendant to the plaintiff of his share of the vessel, as evidenced by the document found in the record marked A, in which the latter is charged with his portion of the hire or expenses of the boat.

The brig and cargo being sunk in the river, general rules relating to maritime salvage are (perhaps) not applicable to the present case; and it might be questioned whether the salvors would be legally entitled to claim any remuneration without a special agreement, to that effect, with the owners of the property saved. In the instance now under consideration, such an agreement was made by the consent of one of the owners of the brig, which they were about to raise, with the owners of the cargo.

From this statement of the cause, it may be considered as reduced to a single question; and that is, whether from the relative situation of the parties, the plaintiff has a right to claim the benefit of the contract which was made by the co-partner of the brig, in the raising of which they united and shared equally both in labor and expense.

Had they hired the use of the steamboat on joint account for a certain term of time, and in such use both given their skill and labor, the profits made during the time ought, in justice, to be equally divided between them. The hiring was, however, for a special purpose, and to effect a particular object; but this does not in any manner change the nature of the claim set up by the plaintiff; considering that the profit now claimed by him was gained by using the boat in the manner contemplated by the contract of hiring *quo ad hoc*, the hirers were temporary owners. It is true, as contended for in argument by the counsel of the appellant, that if the steamboat had been lost in attempting to raise the vessel and her cargo from the bottom of the river, the loss would have fallen on the real owners, under the maxim that *res perit domino*. The same thing would take place in all cases of hiring for use, when no fraud or gross negligence is chargeable on the hirer. The loss having to be borne by the owner, cannot affect the right of a person hiring to the profits derived from a lawful use of the thing hired during the stipulated period.

This has the appearance of a new case. It cannot be identified with the one put by *Pothier* in his treatise on the contract of sale, relating to the cast of the fisherman's net, although it is somewhat similar. Being new, we have not

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Whether the general rules of maritime salvage are applicable to the raising a vessel and cargo sunk in the Mississippi river.—Query?

One person may claim the benefit of a contract for salvage made by another respecting the cargo in a vessel of which they are the joint owners, and in the raising of which, from the bottom of the river, they share equally in labor and expense

Where no fraud or gross negligence is chargeable on the hirer, the owner must sustain the damage resulting from the loss of the thing hired.

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been able to discover any positive rules of law or adjudged cases completely applicable to it; nor has any been adduced by the advocates of the parties. We are, however, of opinion, that according to general principles of equity and justice, the plaintiff ought to recover, &c.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

STONE ET AL vs. CLIFFORD.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

Where a new trial is prayed for on the affidavit of a party, that he has discovered important evidence since the trial; if on an investigation it appear that the facts as stated in the affidavit do not exist, a new trial will be refused.

This was an action brought to recover the sum of twelve hundred dollars for work done on, and materials furnished for a house situated in the city of New-Orleans. The defendant pleaded the general denial, payment and prescription. On the trial, the jury gave a verdict in favor of the plaintiffs, and judgment was accordingly rendered. On appeal, this court decided that evidence was inadmissible to prove a specific contract on the pleadings, though such evidence was properly admitted to show the value of the services and materials furnished. This court also decided, that on the reference to experts in the court below, the omission of the umpire to attend in order to examine the building in question at the time specified in the notice to the defendant, rendered the proceeding illegal. The cause was therefore remanded for a trial *de novo*. *Vide 3 La. Rep. 349.*

The defendant then filed a supplemental answer, in which he alleged, "That the plaintiffs agreed to do the work for which they bring suit, for the sum of eight hundred dollars, which has been paid." The cause was submitted to a jury and a second verdict was returned for the plaintiffs, on which judgment was accordingly entered. A new trial having been refused, the defendant appealed.

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Preston, for appellant.

Morse, for appellees, prayed the judgment of the court below might be amended by allowing them the full amount claimed according to the evidence on record.

MATHEWS, J., delivered the opinion of the court.

This is a suit to recover from the defendant the value of materials furnished, of work and labor performed by the plaintiffs as builders of a house for the former. It is an action on a *quantum meruit*, and the case now comes before this court by a second appeal, having been remanded to the court below, for reasons expressed in our opinion on the first.

On the second trial in the inferior court, the cause was submitted to a jury, who found a verdict for the plaintiffs, and estimated the labor due to them at three hundred and fifty-four dollars and forty-one cents. Judgment was rendered in pursuance of this verdict, and the defendant, after an unsuccessful attempt to obtain a new trial, took the present appeal.

The motion for a new trial was based on an affidavit of the defendant, wherein he swore to the discovery of material testimony subsequent to the trial, &c. It appeared, however, on an investigation, that the facts as alleged in the affidavit did not exist, and consequently the parish court determined correctly in overruling the motion.

Where a new trial is prayed for on the affidavit of a party, that he has discovered important evidence since the trial, if on an investigation it appears that the facts as stated in the affidavit do not exist, a new trial will be refused.

The decision of the case, as it appears from the record, depends solely on matters of fact, of which the jury were competent judges. The testimony relating to the value of services performed by the plaintiffs is somewhat discordant,

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but in our opinion does not preponderate so much in favor of their pretensions to a greater sum than was awarded by the jury, as to authorise a reversal of the judgment of the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

COOTE vs. COTTON.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The word servant in the Civil Code, Article 3499, is restricted to *menial* servants.

An action for the wages of a person employed in selling and superintending slaves, is barred by the lapse of three years.

Although the case be tried by the jury on an erroneous charge from the court, it will not be remanded, if it can be terminated in the appellate court without depriving either party of any advantage resulting from the verdict of the jury, and if relief can be given as to the error resulting from the charge.

This was an action to recover from the defendant the value of services rendered by the plaintiff in collecting, selling and superintending slaves, to which the defendant opposed the prescription of one or three years.

On the trial of the cause the defendant's counsel prayed the court to charge the jury that the plaintiff's claim was prescribed by the lapse of one year, according to *Art. 3499, of the Civil Code*. But if not, that so much of it as did not arise within three years previous to the institution of the suit, was prescribed according to *Article 3503, of the Civil Code*, which charge the court refused to give; but did charge the

jury that the claim was prescribed only by ten years. The jury returned a verdict in conformity to this charge, and judgment being rendered thereon, the defendant appealed.

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Strawbridge, for appellant, made the following points:

1. There was error in the admission and rejection of testimony as by bills of exception.

2. There was error in the verdict and a new trial should have been granted.

3. There was error in the charge of the judge. The causes which interrupt or suspend prescription are enumerated by the *La. Code*, *Art.* 3482, 3487; beyond these, the law has not distinguished, and the court cannot. Moreover, in the case of *Judice's heirs vs. Brent*, 6 N. S. 228, the plea of prescription was supported against a claim for continuous services. On the other questions of prescription, the case of *Nichols vs. Hanse et al.*, reported in 8 N. S. 492 and 2 *La. Rep.* 382, and that of *Tietjen vs. Penniman*, 1 *La. Rep.* 268, are referred to as showing this falls within the prescription of one year.

Schmidt, contra.

1. There is no error in the judgment of the District Court, except the setting aside the order of bail. He therefore prayed that judgment be confirmed as to all the rest, and amended as to the bail.

2. There are no other prescriptions than those established by the *Civil Code*, *Art.* 3433.

3. The plaintiff is not in the predicament of any of the individuals enumerated in *Art.* 3499.

4. Nor does he fall under *Art.* 3503.

5. Whence it follows, that his claim is barred only by the provision of *Art.* 3508.

6. Should he be regarded as an overseer, the continuance of his services would preclude the plea of prescription, *Vide Art.* 3500, which, by expressly declaring that in the cases there enumerated, prescription takes place though the service, &c. were continued, admits the general principle, that

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such continuance interrupts prescription, and that the cases there enumerated form an exception to the general rule.

7. The cases referred to by the counsel of appellant, have no analogy to the present case.

8. The appellee moreover relies, on the acknowledgements made by Cotton, and his promise to give plaintiff whatever money he might want. *Vide Art. 3486.*

MARTIN, J. delivered the opinion of the court.

The defendant and appellant has built his hopes of the reversal of the judgment, and having the case remanded for a new trial on a bill of exceptions which he took to the opinion of the court, who declined to instruct the jury that the action was barred by the lapse of one or three years, and charged that the prescription of ten years was alone applicable thereto.

The plaintiff claimed compensation for services rendered to the defendant, during nine years in buying and selling slaves, and in collecting and superintending others purchased by the defendant.

The evidence shows that the plaintiff was employed chiefly in collecting and superintending slaves, bought by the defendant or his agents, for whom it appears he purchased a few and sold some; that the defendant supplied him with sums of money to buy slaves, and other sums to carry to his other agents.

It is contended on the part of the plaintiff, that his services were those of an agent, which are barred by the prescription of thirty years under the former, and of ten years under the present code, while the defendant contends they were those of a servant, a laborer or workman, which are barred by the prescription of one year, or at most those of a clerk, which are barred by that of three years. *Civil Code, 3499 and 3503.*

The defendant, to support his pretensions, has urged that the evidence shows that the plaintiff, before he came to his service was in the humble situation of a boatman, a sawyer and a weaver, and the plaintiff has shown that afterwards

he dressed so genteel, and lived in such a style that he was thought to be the defendant's partner.

We think the District Court correctly refused to charge that the action was prescribed by the lapse of one year.—The plaintiff was neither a workman nor a laborer, and the word *servant* in the *Civil Code*, 3499, is in our opinion to be restricted to *menial* servants.

But we think the judge erred on refusing to charge that the action was prescribed by three years, as the plaintiff is, in our judgment, to be considered as the defendant's clerk.

But the plaintiff has urged that in this view of the case, the continuity of his services presents an obstacle to the application of prescription; because the affirmative proposition in the cases of workmen, laborers and servants, that as to them the continuity of the services forms an obstacle to the prescription, is pregnant with the negative; that in other cases it does not.

This point was otherwise determined in the case of *Judice's heirs vs. Brent*. 6 *Martin, N. S.* 228.

An attorney claimed compensation for services during five years, at one hundred dollars a year, on a special contract; prescription was pleaded and this court held that on the two first years the action was barred.

Although the case was tried by a jury on an erroneous charge from the court, we think justice does not require the case should be remanded for a new trial; because we may terminate it here, without depriving either party of any advantage resulting from the finding of the jury, and give the defendant relief as to the error in which the mistake of the inferior court led them.

Compensation for nine years services was claimed; the judge ought to have told the jury that the claim for the first six years services was barred. Had this been done, the verdict would have been for three years services instead of nine, i. e. their verdict should have been for one-third of the sum allowed.

For this one-third the plaintiff is entitled to our judgment. It is, therefore, ordered, adjudged and decreed, that the

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The word servant in Civil Code Art. 3499, is restricted to menial servants.

An action for the wages of a person employed in selling and superintending slaves, is barred by the lapse of three years.

Although the case be tried by the jury on an erroneous charge from the court, it will not be remanded, if it can be terminated in the appellate court without depriving either party of any advantage resulting from the verdict of the jury, and if relief can be given as to the error resulting from the charge.

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judgment of the District Court be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of six hundred and forty-seven dollars, with costs in the District Court; that the plaintiff and appellee pay costs in this court.

Mc CARTY vs. STEAM COTTON PRESS COMPANY ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where the vendor's title is communicated to the vendee, and the latter confines himself to one objection, he cannot set up other informalities as a ground of suspending payment.

At the sale of an insolvent's succession administered by syndics, the mother of the minor heirs of that insolvent may become the purchaser of property belonging to the succession.

The re-enactment of a general provision found in a former statute, does not repeal the exception which accompanied that provision in the previous law.

When the alienation takes place by auction where the price cannot be known before the object is stricken off, the approbation of the judge can alone be legally given after the sale.

This action was brought to obtain possession of three promissory notes, signed by defendants and deposited in bank. The notes had been given for a part of the consideration money of land and buildings sold by plaintiff to defendants. The latter feared they should be disquieted in their possession, and it was agreed the notes in question should remain in the bank until defendants should consent to a transfer of them being made to plaintiff, or until plain-

tiff should obtain a final judgment establishing the title to the land and buildings.

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The petition sets forth that plaintiff was the wife of Jean Blanque, deceased; that she brought a large sum as her dotal portion, as appears by their marriage contract; that her said husband dying, she was appointed by the Court of Probates of New-Orleans, as guardian of her minor children by said marriage; that she renounced the community; that a forced surrender of her deceased husband's property took place, and syndics were appointed by the creditors with power to compromise with her for her dotal rights; that she received the said land and buildings as part payment of her dotal right; that the minor children, who were made parties, and to whom a curator *ad hoc* had been appointed, had no claim whatever on the land and buildings.

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The answer states, that the sale by the said syndics took place without the advice of a family meeting, and without the authorization of a competent judge; that the plaintiff was then tutrix of the said minors, and purchased the said land and buildings, which she was not permitted by law to do; that the proceedings were *coram non judice* the Parish Court having no jurisdiction, or if it had, they are irregular, the minors not having been made parties thereto.

The curator *ad hoc* appeared, and consented that the prayer of plaintiff's petition be granted. One of the said children having become of age, intervened and stated she had renounced the succession of her father, by act passed since this suit was brought. The curator *ad hoc* then filed his supplemental answer, sitting forth a similar renunciation on the part of the minors, on the advice of a family meeting.

On the trial the cause was dismissed, the judge stating that no cause of action had been shown against the defendants. The plaintiff appealed.

Moreau and Soulé, for appellant.

D. Seghers, for appellees.

The opinion of the court was delivered by PORTER J.

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The plaintiff sold to the defendants real estate, and by a clause in the contract it was agreed, that in consequence of a doubt which existed in relation to her title to the property, a portion of the promissory notes given by defendants in payment, should be deposited in bank, and should not be withdrawn therefrom, unless by check signed by both the contracting parties, or after a judgment of a court of justice on the matter in dispute.

This action is brought to compel the defendants to permit these notes to be taken out of the bank by the petitioner, or in case of their refusal, to obtain a decree establishing her right to do so. The heirs of Jean Blanque, are made parties to the suit, under the supposition that this claim, real or supposed to the premises, formed the principal obstacle to the validity of the plaintiff's title.

The steam company answered the petition by averring, that they had just reason to fear they should be disquieted in their possession of the property purchased, by an action of eviction on the part of the heirs of Jean Blanque: Because the land in question belonged to him at the time of his death; his children were minors; the petitioner was their tutrix; the land their property by inheritance, and was sold without the advice of a family meeting, and without the authorization of the parish judge. The plaintiff was tutrix, and not permitted to purchase the property of her ward. The proceedings of the creditors of the deceased were *non judice* and void, as the parish court had not any jurisdiction of the subject matter.

The curator of the minors filed an answer, in which he stated that he did not conceive the minor heirs had any interest to oppose the demand of the petitioner. There was subsequently executed by the minors, under the approbation of the judge of probates, preceded by the advice of a family meeting, an act, wherein they renounced the succession of their father.

One of the children of Blanque, who had obtained the age of majority, pleaded to the same effect as the curator of the minors, and on her part also renounced the succession.

On these pleadings, the parties went to trial in the court

below. There was judgment for defendants, and the plaintiff appealed.

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By the 2585th article of the *Louisiana Code*, it is provided, that the buyer who has just reason to fear that he shall be disquieted by an action of mortgage, or by any other claim, may suspend the payment of the price, unless the seller prefer to give security.

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There is an exception to this rule, says the same article, "when the buyer has been informed before the sale, of the danger of the eviction."

Our first inquiry, therefore, is, whether the buyers in this instance were informed of the danger, the existence of which they now present as a defence to the demand made in the petition.

On recurring to the act of sale, a clause is found, of which the following is a translation: "Whereas, the Cotton Press Company, had the opportunity before signing of these presents, to have the titles of the vendor examined by their counsel, Mr. Dominique Seghers, and by the opinion of said counsel, given in writing, under his signature, of date the 20th of this month, the many objections which may exist to said titles are reduced to one, which is this, that at the time the vendor acquired the plantation which belonged to the succession of her husband, Jean Blanque, a portion of which she now sells, she was *tutrix* of four children, issue of her marriage with said Jean Blanque, and in this quality it is doubtful if she could become the purchaser of the property which belonged to the minor children, even under the authority which he obtained from the Probate Court, in consequence of this doubt," &c. &c.

From this clause it is seen the objections of the defendants were confined *alone* to the want of power in the mother to buy, in consequence of the relation in which she stood to the minors. They cannot now allege any other defect. Did the proof merely show that the titles had been communicated to them, and they had contracted with a knowledge of the informalities in the title, but without remarking on them, they could not, under the article of any code already cited, set up

Where the vendor's title is communicated to the vendee, and the latter confines himself to one objection, he cannot set up other informalities as a ground of suspending payment.

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those informalities as a ground for suspending payment. They would be compelled to rely on their warranty. *A fortiori* the same rule must apply, where, after a full knowledge of all defects, they confined their objection to one, and required merely that it should be removed, before they paid the price. Our law as it now stands, imposes most onerous obligations on vendors. After having lost the enjoyment and the fruits by the alienation, they may, if unable to give security, for years be deprived of the price, on the suggestion of difficulties in regard to title, which, but for the apprehensions of the purchaser, never would have been thought of. When, to guard against such danger, they submit their title papers to the buyer before the contract is closed, and he chooses to consider them open only to *one* objection, it would be intolerable if he could afterwards set up every other which his fears might suggest, or the learning of his professional advisers might discover.

We conclude, therefore, that by the contract between the parties, we are precluded from examining any other illegality in the title of the plaintiff, save that which may result from the want of capacity as tutrix, to purchase. All the objections drawn from the defect of power in the court to order the sale, together with those presented by the non-existence of the other formalities required for the legal alienation of minors' property, were waived by the agreement.

At the sale of an insolvent's succession administered by syndics, the mother of the minor heirs of that insolvent may become the purchaser of property belonging to the succession.

The question then, is, whether at a sale made of an insolvent's succession, administered by syndics, the mother of the minor heirs of that insolvent can become the purchaser of property belonging to the succession. We think she may, when the purchase is sanctioned by the judge under whose jurisdiction the minors live. For the purposes of this inquiry, we must, as has been already observed, consider the court which ordered the sale as having jurisdiction, and that the syndics properly represented the estate. By the 4th law of the 5th title of the 5th Partidas, in force at the time this transaction took place, tutors are prohibited from purchasing the property of their ward, unless they were authorised by the judge of the place to make the acquisition. By the 1st law

of the 12th title of the 10th book of the *Novissima Recopilacion*, this prohibition is repeated, even if the sale be public, but nothing is said in regard to a purchase made under the authority of the judge. It is contended, that the latter enactment does away with the exception which stood with a prohibition of the same kind in the *Partidas*. But it has been frequently decided by this court, and we believe correctly, that the re-enactment of a general provision found in a former statute, does not repeal the exception which accompanied that provision in the previous law. Such seems to be the opinion of several commentators we have been able to consult in relation to the two laws just cited. See note of *Gregorio Lopez on the Partidas*, 5. title 5. law. 4 Febrero, p. 1. cap. 7. sec. 1. no. 2. *Siguenza*, lib. 1. cap. 5. nos. 4 and 5. There are, it is true, others who think differently, but the conclusion of the former it appears to us, is much more consistent with the sound rules of construction. *Acêvedo*, vol. 2. 385, no. 1. *Sala Ilustracion de Derecho*, lib. 1. title 7. no. 37.

But it is said that the approbation of the judge of probates followed, and that it should have preceded the sale. The law does not specify at what time it is to be given, and we think that when the alienation takes place by auction, where the price cannot be known before the object is stricken off, that the approbation of the judge can alone be usefully and legally given after the sale.

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The re-enactment of a general provision found in a former statute, does not repeal the exception which accompanied that provision in the previous law.

When the alienation takes place by auction where the price cannot be known before the object is stricken off, the approbation of the judge can alone be legally given after the sale.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; and it is further adjudged and decreed, that the defendants do sign a check jointly with the plaintiff, for the notes mentioned in the petition, now deposited in bank: and it is further ordered, that the defendants, the Cotton Press Company, pay costs in both cases, except those occasioned by making the minor heirs of Blanque parties to this action, in relation to whom, it is adjudged and decreed, that there be judgment as in case of non-suit, with costs in both cases.

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vs.
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PEMBERTON vs. ERWIN ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

After an appeal taken from a judgment below dismissing exceptions filed by the defendant, to the security which was furnished by the bond, the inferior court cannot enter into the validity of that instrument on the application of the plaintiffs.

If with the consent of the plaintiff the execution be stayed until he furnish security to the satisfaction of the court—the defendant will have the right to contest the sufficiency of the security offered. Although it be questionable whether the case was one, in which security would have been ordered if required by the defendant.

The dismissal of exceptions to the sufficiency of the security offered, does not work an irreparable injury, and an appeal therefrom will be dismissed as premature.

This action was brought by the payee against the widow and heirs of the drawer of two promissory notes for ten thousand dollars each.

The defendants admitting the signature, alleged the notes were given in part payment for a plantation and slaves in the parish of Iberville, sold by the plaintiff, and to which his vendor had never had title.

Before this want of title in plaintiff was discovered, the drawer of the notes had sold the plantation and slaves to the widow Zacharie, since deceased. As a part of the consideration of this sale, she assumed the obligation to pay the notes. The defendants averred that her heirs are bound to save them harmless, and accordingly cited them in warranty.

The heirs of Mrs. Zacharie appeared and denied any obligation on their part, until a good title should be shown in the plaintiff's vendor, and until several mortgages on the property, stated in the act of sale to the plaintiff, were satisfied.

A suit had already been instituted by the plaintiff against the heirs of Mrs. Zacharie upon the notes in question, and upon consent of the parties the two suits were ordered to be consolidated.

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The court gave judgment for the plaintiff, and with his consent ordered a stay of execution, until he should file in court his bond with security, to the satisfaction of the court, against any claims of certain heirs. The mortgage on the plantation and negroes was decreed to be executory against the heirs of Mrs. Zacharie.

The plaintiff filed the bond with the original vendor as surety. The defendants excepted that the surety was already bound as vendor, that the amount of the bond was insufficient; and for these and other reasons they prayed stay of execution accordingly.

The defendants, exceptions were overruled, the judgment in some particulars amended, and a new trial refused.

On the 12th of June a rule was taken on the defendants, to show cause why the bond and mortgage offered, should not be approved by the court. On the 21st of the same month, a petition of appeal was granted, and on the 23d, the rule taken on the defendants was made absolute.

The plaintiff afterwards took a rule on the defendants, to show cause why the order granting an appeal should not be received. This rule was discharged.

D. Seghers and Peirce, for appellants.

Slidell, for appellee.

The opinion of the court was delivered by PORTER, J.

This action was brought to enforce payment of two notes, given to the plaintiff in consideration of a plantation sold by him. The court on the 18th May, 1832, gave judgment against the defendants for the amount claimed in the petition, and further ordered, with consent of the plaintiff, that execution be stayed on this judgment until the plaintiff

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should file his bond, with security, to the satisfaction of the court, against the claims of certain persons who it was feared might set up title to the premises.

In pursuance of this judgment, the plaintiff did file in court a bond with surety, supported by mortgage on certain property therein specified.

On the 31st May, the defendants filed several exceptions to the sufficiency of the security tendered, and on the first of June, the court, after hearing counsel, ordered them to be dismissed.

In the inquiry which preceded this decision, the defendants produced several witnesses who were sworn and examined in support of the exceptions, and the court was requested to have the testimony reduced to writing, to serve the party by whom the proof was introduced, in case an appeal should thereafter be taken. The judge below refused this demand, on the ground that it was a matter entirely within the discretion of the court below, from the decision of which no appeal could be taken.

The defendants then applied to the Supreme Court for a *mandamus* to compel the judge of the District Court, to sign a bill of exceptions, which had been tendered to him, and in which his refusal to permit the testimony to be reduced to writing was set forth. This court, after hearing the parties, was of opinion that the judge below should sign the bill of exceptions; and a *mandamus*, directing him to do so, was accordingly issued. This order was made on the 4th June.

And on the 12th of the same month, a rule was taken in the District Court by the plaintiff on the defendants, calling on them to show cause, on Saturday next, the 16th, why the mortgage and bond given by the plaintiff should not be approved by the court. On the day last mentioned, testimony was adduced by both parties, and the cause was continued until the 23d. On that day the court gave judgment, by which the bond filed by the plaintiff was approved.

But previous to this judgment, viz:—on the 21st, the defendants presented to the judge a petition of appeal from the decree of the first June, by which their exceptions had

been dismissed. This appeal was granted by the judge, and on that appeal the case now comes before this court.

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After this appeal was granted, the defendants applied for a writ of prohibition from this court to that of the district, restraining it from making any further orders in relation to the validity of the bond, until the appeal could be determined. The application was sustained, and the writ of prohibition issued.

It is our opinion that after an appeal taken from a judgment below, dismissing the exceptions filed by the defendants to the security which was furnished by the bond, the inferior tribunal could not enter into the validity of that instrument, on the application of the plaintiff: because the defendants would either have been deprived of the benefit of objections which the court had already decided were invalid, or if permitted to renew them, there would have been a second trial on matters already passed on, and then pending before the appellate tribunal. Whether the appeal was premature, or not, was a question which the inferior court had lost cognizance of, by the fact of having granted it. We therefore think we are limited in our inquiry to the facts which preceded the judgment appealed from, and that what took place afterwards, cannot in any respect affect our decision.

After an appeal taken from a judgment below, dismissing exceptions filed by the defendants, to the security which was furnished by the bond, the inferior court cannot enter into the validity of that instrument on the application of the plaintiffs.

It has been contended that the offer to furnish security was entirely gratuitous on the part of the plaintiff, and that the defendants had no right to complain of the insufficiency of it; but we think differently. It is true, it may be questionable whether the case is one in which it would have been ordered, but it was a defence which was presented by the pleadings, and in which the defendants had a right to the judgment of the court. The consent of the plaintiffs to furnish the security, and their agreement to make the issuing of execution conditional on their doing so, conferred on the defendants the right to see that condition complied with. It could not have been a compliance with it to furnish insufficient security. The terms used in the judgment by which the bond was to be given to the satisfaction of the court, cannot be understood as depriving the opposite party of the

If, with consent of the plaintiff, the execution be stayed until he furnish security to the satisfaction of the court, the defendant will have the right to contest the sufficiency of the security offered—although it be questionable whether the case was one, in which security would have been ordered if required by the defendant.

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SOULIE

vs.

SOULIE.

The dismissal of exceptions to the sufficiency of the security offered, does not work an irreparable injury, and an appeal therefrom will be dismissed as premature.

right to show why the court should not be satisfied with the security offered.

We are, however, of opinion, the appeal was premature. The dismissal of the exceptions worked no irreparable injury to the defendants. A judgment of the court below, sustaining the validity of the bond, could alone have such effect; and until that judgment was rendered, no injury was inflicted, while an appeal from it would not have redressed.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed with costs.

SOULIE vs. SOULIE.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

The Probate Court cannot entertain jurisdiction of a suit against the curator of an absentee.

This suit was brought to recover certain sums of money deposited in the bank, and others in the possession of defendant. The defendant was sued as the curator of an absentee. The money claimed had been received upon certain promissory notes, which the absentee had formerly taken as agent of the plaintiff, and while in the employ of the latter.

The defendant excepted to the jurisdiction of the court, and then pleaded to the merits.

The court sustained the exception, and the plaintiff appealed. The court considered the Probate Court to have no powers but those specially delegated; that the power of deciding on claims against the estates of absentees, is not included in the 924th article of the *Code of Practice*; and the 14th section of the act of March 25, 1828, entitled "An act further amending certain articles of the *Civil Code* and

of the *Code of Practice*," makes no change in the *Code of Practice* in relation to the estates of absentees. EASTERN DIS.
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Seghers, for appellant.

The Court of Probates has jurisdiction in this case. *Code of Practice*, arts. 925, 963, 964. *Civil Code*, art. 53.

Schmidt, for appellee.

The Court of Probates has no jurisdiction of the matter in controversy. *Code of Practice*, arts. 925, 924, act of March 25, 1828. The judgment should, therefore, be confirmed.

The opinion of the Court was delivered by MARTIN, J.

The plaintiff is appellant from a judgment sustaining the defendant's plea to the jurisdiction of the court, on the grounds that he was sued as the curator of Rillieux, an absentee, for a debt of the latter, and the action could not be brought in any other than the Parish or District Court.

The appellant has relied on the *Code of Practice*, 925, 963 and 964. *The Civil Code*, 53, and the 14th section of the act of Assembly of 1828, p. 156.

It appears to us that the court did not err. The *Code of Practice*, 963, vests in Courts of Probates, exclusively, the appointment of curators of absentees; the next article prescribes to other courts in which an absentee has a suit, to appoint him a curator *ad hoc*, and we find nothing that can avail the plaintiff in article 925. The *Civil Code*, in the part cited, imposes on curators of absentees, all the obligations, responsibilities and mortgages, to which tutors are subjected. Hence they are to render an account of their administration in the Court of Probates. It would be, in our opinion, too forced a construction of the Code, to infer from this circumstance, that they are sueable in that court. It is not shown, that tutors are, except in cases of debts of their minors, resulting from the compliance of a successor, with the benefit of an inventory.

The Probate Court cannot entertain jurisdiction of a suit against the curator of an absentee.

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The act of 1828, cited, relates only to curators of vacant estates; if there could be any doubt of this, it would vanish on a recurrence to the French text, of the 14th section, which uses the words, *curateurs des successions*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

JONES ET AL vs. SMALLEY.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

By the common law, when the plaintiff's right of recovery depends on, and arises from an act to be done by him, he must either show an actual tender and refusal, or that every thing has been done by him which could be done to carry the contract into effect.

Notice in the newspapers is not sufficient, unless a knowledge of that notice be brought home to the party.

Whether, when the party is in the place, personal notice is not necessary.
Query?

The plaintiffs must show that they were ready and willing up to the last moment given for the performance of the contract, to do every thing required of them.

This was an action to recover damages for an alleged breach of the following contract:

"We, the undersigned, agree to ship with the steamboat Samson, fifty head of horses by the first trip, at fifteen dollars per head, with all the grain in barrels that we may wish to put in, and a reasonable quantity of packed hay: To pay customary freight on any that remains on their arrival at their place of destination," &c. &c.

The plaintiffs, with whom the contract was made, were the owners of the boat, and alleged in their petition, that in consequence of this agreement, they were put to great expense in fitting the hulk of the Hercules, as well as fixing the steamboat Samson for the transportation of the horses; and that they were prepared to receive them on board and transport them as agreed on, of which the defendant was duly notified, but failed to comply with his part of the agreement.

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The defendant, among other matters of defence, denied notice of the departure of the boat; and the evidence on this point showed, that the time of the departure of the boat was made known by the usual notices in the public journals, and by putting up bills at the hotels; but nothing showed that a knowledge of these notices were brought home to the defendant, or that personal notice was given. There was judgment for defendant in the court below, and the plaintiffs appealed.

Worthington, for appellants, made the following points:

1. We contend that the facts exhibited in this case, are sufficient to entitle us to recover without showing a direct personal notice.

2. The laws of Ohio control this case, the contract having been entered into in that state. 1 *La. Rep.* 254, 534. 2 *ibid*, 115.

3. In the absence of evidence, the court will not presume the existence of a rigid technical rule, but will decide upon the circumstances of a case agreeably to the principles of reason and the ordinary rules of justice. The court will notice the rules of the common law as derived from treatises and reports. 1 *La. Rep.* 255. 3 *Blackstone's Com.* 336.

Schmidt, for appellee, made the following points:

The judgment of the District Court is correct, and should be affirmed:

1. Because the appellants have not shown that they assented

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to, or accepted of the contract sued on. *La. Code, arts. 1759, 1761, 1791, 1805, 6, 7, 8, &c.*

2. Because the defendants and appellees were never legally put in *default* or *mora*, or even notified of plaintiffs' intention to depart. *La. Code, arts. 1905, 1907. Code of Practice, art.*

13. *Wilbor vs. McGillicuddy, 3 Miller, 382. Kohn and Bordier vs. Packard, ibid, 228.*

3. Because no damages have been proved. *La. Code, arts. 1920, 1921, 1927, 1928, &c.*

PORTER, J., delivered the opinion of the court.

The petition states, that the plaintiffs are owners of a steamboat called the *Samson*, and that the defendant agreed at Cincinnati, in the state of Ohio, to ship fifty horses on board of her, to be transported to New-Orleans, at the rate of fifteen dollars each, and that he signed an agreement to that effect.

It further avers, that plaintiffs were put to considerable expense in making the alterations and arrangements on board the boat necessary to receive the horses; that the defendant was notified of the time of her departure, and of the readiness of the plaintiffs to receive them on board; and it concludes by averring damages to the amount of seven hundred and fifty dollars, sustained by the petitioners, in consequence of the breach of the contract.

The answer sets up various grounds of defence, and the argument at the bar embraced all the points at issue. We have directed our principal attention to one of them, being of opinion it decides the case.

It was contested whether the rules of the common law, or those of Louisiana, should regulate the contract. We shall take the former, as the plaintiffs insisted we ought; because even by them, we do not think they have made out a case which entitles them to recover.

By the agreement, the horses were to be shipped by the first trip of the boat. The departure, owing to ice in the river, was delayed for six weeks. The contract not having

fixed a particular day for the performance, notice of the time the boat was ready to receive the horses, was necessary. Notice is accordingly averred in the petition, but in our opinion, the evidence does not support the allegation in such a manner as to bring the case within the rules of law which govern it.

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By the common law, as we understand it, when the plaintiff's right of recovery depends on, and arises from an act to be done by him, he must either show an actual tender and refusal, or that every thing has been done by him, which could be done, to carry the contract into effect. *Cro. Elis.* 888. *Sulk.* 623. 1 *Lord Raymond*, 686. 5 *East*. 107.

By the common law, when the plaintiff's right of recovery depends on, and arises from an act to be done by him, he must either show an actual tender and refusal, or that every thing has been done by him which could be done to carry the contract into effect.

Notices of the usual kind are proved to have been inserted in the Cincinnati papers, of the departure of the boat; and handbills to the same effect were put up at the hotels. It is proved the defendant was at the landing when the Samson was taking in her load, and that the place where he was seen was but a short distance from, and within sight of her.

Notice in the newspapers is not sufficient, unless a knowledge of that notice be brought home to the party

There is nothing in the record to bring the knowledge of these notices home to the defendant. The evidence only proves he might have known of the departure of the boat, not that he did know of it. It perhaps authorises the inference, he was aware she was taking in freight, because he was on the wharf, but it does not authorise us to go further and say he knew when she was to depart. Besides, it is doubtful whether, as the defendant was in the city, personal notice should not have been given. It would seem the plaintiffs did not do, as the law required them to do, every thing in their power to give the contract effect.

Whether, when the party is in the place, personal notice is not necessary. Query?

But if this difficulty could not be got over, another remains equally formidable. The parties, it is shown, modified their original contract, which was to put the horses on board the Samson, and afterwards agreed, that the hull of another boat, the Hercules, should be fitted up to receive and transport them. We have it in evidence, that this boat, which was at some distance from the landing, was never brought there up to the time of the departure of the Samson, which was to take her in tow. By the rules of the jurisprudence which

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The plaintiffs must show that they were ready and willing up to the last moment given for the performance of the contract, to do every thing required of them,

apply to the case, the plaintiffs must show that they were ready and willing up to the last moment given for the performance of the contract, to do every thing required of them, and unless they show this, they cannot recover. Upon this principle it was decided, in two of the cases already cited, that in an action for not accepting a transfer of stock, it was not sufficient for the plaintiff to show that he gave notice to the defendant to attend on a particular day and accept the transfer, and that the plaintiff went to the bank to perform his part of the contract, unless he showed that he staid at the banking house, until the last time of the day, at which the transfer could be made. In neither of these cases was it proved, that the defendant had attended at any hour of the day; but the courts held, that the opposite party, to supply the want of tender and refusal, must prove he had done every thing in his power to carry the contract into effect.

The facts of the case show, that the defendant, previous to the departure of the Samson, had entered into a contract to have his horses taken down the river in another boat; but this, in our opinion, did not dispense with the necessity of the plaintiffs doing every thing which the law required them to do to give them a right of action. It shows an unwillingness merely on the part of the defendant to carry his contract into effect, not an impossibility for him to do so; and it is the latter which alone excuses the plaintiff from the non-performance on his part. The effect, too, of this testimony, is a good deal weakened by proof from the other side, that the plaintiffs were satisfied with the change in the defendant's intentions. A witness swears that he heard one of them say, that he was glad of it, as it saved him the trouble of towing down the hull of the Hercules. The great quantity of ice then in the river, accounts very satisfactorily for this declaration on the part of the owner of the boat.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be affirmed, with costs.

OF THE STATE OF LOUISIANA.

33

HYDE vs. BROWN.

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December, 1892.

HYDE
vs.
BROWN.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The signature of a note must be expressly denied.

Interest on interest cannot be given.

This was an action brought by the payee against the drawers of a promissory note, on which several payments had been made. By the terms of the note, interest accrued at eight per centum, after the specified period for payment. The defendants plead separately. Brown filed a general denial to the plaintiff's allegations. Barney admitted the signature of the note, alleged that its consideration was certain merchandise purchased of plaintiff, which had passed into Brown's possession, and for which Brown had not accounted with him, and prayed a separate trial by jury.

The court rendered a judgment against Brown, and a new trial was granted on the ground, that while the trial of a previous case was going on, his counsel stepped down into the Criminal Court, and no notice was there given to his counsel when his cause was called and tried. On the second trial judgment was again rendered against Brown, from which he appealed.

Wharton, for appellant.

Carleton and *Lockett*, for appellee, contended :

That the judgment of the court below is correct from the evidence introduced; that the appeal was taken for delay, and that ten per centum damages should be awarded.

PORTER, J. delivered the opinion of the court.

This is an action by the payee of a promissory note against the maker. There was judgment in the court below in favor of the plaintiff, and the defendant appealed.

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January, 1833.

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vs.
BROWN.

The signature
of a note must be
expressly denied.

Interest on in-
terest cannot be
given.

The execution of the note is not put at issue. The general denial is alone pleaded, but under the 324th and 326th *Articles of the Code of Practice*, the denial of the signature must be express. See the case of *Hughes vs. Harrison and wife*, 8 N. S. 297.

But there is error in the judgment below. The balance due on the note is three hundred and seventy-eight dollars and fifty-four cents. On this, interest is calculated up to the time of rendering judgment, and the defendant is decreed to pay interest on the whole amount until paid; which is giving interest on interest.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; and it is further adjudged and decreed, that the plaintiff do recover of the defendant and appellant, the sum of three hundred and seventy-eight dollars and fifty-four cents, with interest at eight per cent., from the 11th October, 1830, until paid, with costs in the court below. Those of appeal, to be paid by the appellee.

RILS vs. BROWN.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

If the sum appealed from, be less than three hundred dollars, the appeal will be dismissed.

This action was brought to obtain a joint interest with the defendant in a judgment rendered in favor of the latter, on a draft or order for four hundred and twenty dollars, payable on demand. The payee of the order being indebted to the drawer, it was agreed between them and the assignee,

who is the present defendant, that the plaintiff should retain the one half of the amount.

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A judgment, however, was obtained in favor of the present defendant for the whole amount, and to obtain the one half, is the object of this suit.

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VS.
BROWN.

The cause was decided in the defendant's favor. The plaintiff having failed in his attempt for a new trial, appealed.

Labauve, for appellants.

1. It is clear and apparent on the face of the record, that the judgment of the court below is erroneous.

2. It is a property in contest between the parties, the sequestration and injunction were conservatory acts during the pending of the suit. *Code of Practice*, arts. 272, 302 and 303.

3. The affidavit annexed to the petition is, in the requisites of the law, fully sufficient.

4. The sequestration and injunction were properly executed in Milançon's hands, the debtor, otherwise he might have paid to Phebe Brown.

5. The plaintiff did not enjoin the execution of the judgment, he merely enjoined the payment to Phebe Brown; the sheriff was ordered to take and keep in his possession, the said judgment.

6. The plaintiff was a third party demanding his rights, and ought not to have been condemned to pay damages to the defendant. *Ricardo's heirs vs. Hiriart*, not yet reported.

7. The security on the bond was wrongfully sentenced to cost; there was no law authorising such a decree in the case.

Burke and Davis, for appellee.

1. The proceedings in injunction and sequestration, were wrong:—1. Because they could only apply to the proceeds of the judgment, and not to prevent its execution. 2. Because the whole judgment was sequestered and enjoined

EASTERN DIS. when only a part of the proceeds were claimed. *Code of Practice, art. 300.*
January, 1833.

RILS
VS.
BROWN.

2. Sequestration is not a proper remedy, and cannot be resorted to by the plaintiff. *Art. 285, Code of Practice.*

The ownership of the judgment is not in dispute; but only a privilege is claimed upon the proceeds of it. If, therefore, a sequestration could be demanded, the oath is insufficient. *Code of Practice, art. 275, no. 6, act of 1826.*

3. Rils is not a third party.

4. The case of *Ricardo & Co. vs. Hiriart*, does not say that all third parties shall not pay damages.

MARTIN, J., delivered the opinion of the court.

If the sum appealed from, be less than three hundred dollars, the appeal will be dismissed.

The plaintiff's cause of action in this case, is the defendant's seeking to recover the whole amount of an order for four hundred and twenty dollars, bearing interest at ten per centum, from October 5, 1831, while the plaintiff is entitled to only one half thereof. The plaintiff's writs of sequestration and injunction were set aside, and he was mulcted in damages to the amount of forty-six dollars.

It is clear he improperly obtained an appeal, as the cause of action is evidently less than three hundred dollars.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

CROCKER vs. DE PASSAU.

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vs.
DE PASSAU.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

All former rules of practice, not sanctioned by the Code of Practice, are repealed.

If a party before the adoption of the Code of Practice, had the right to two distinct actions, the Code does not impair that right; although it details a specific course as to one of them.

If the sheriff illegally seize and sell on execution, the property of a third person, the latter has his remedy both against the sheriff, and the plaintiff in execution, or either of them.

A bailee is not recognized as owner, when by a clause in the bailment, he has undertaken to indemnify the bailor for the loss of the thing bailed, if it perishes during the bailment.

This action was brought to recover the damages, suffered by the plaintiff, in consequence of the seizure by the defendant, as sheriff, of the plaintiff's property. It was seized as the property of a third person, the defendant in another suit. The plaintiff, in the other suit, was not made a party defendant with the sheriff, in this.

To this omission to make the plaintiff, in the former suit, a co-defendant, exception was taken. The exception was dismissed.

The defendant then answered, that he found the property in question, in the possession of the defendant, in the former suit; that no legal claim or opposition had been made by the present plaintiff, and that the title of the present plaintiff, to the property, was based in fraud, and only intended to shield the property from the creditors of the former defendant.

On the trial, the plaintiff excepted to the opinion of the court, sustaining the objection of the defendant to the introduction of parol proof, to show the contents of a written

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DE PASSAU.

amicable demand, without having first called on the defendant to produce the demand in writing. The plaintiff took several other bills of exceptions, to the rejection of testimony offered by him.

The jury returned a verdict for the plaintiff, and after an ineffectual attempt to obtain a new trial, on the grounds of excessive damages, and the verdict being contrary to law and evidence, the defendant appealed.

Preston, for appellant.

Hennen, for appellee.

1. The verdict of the jury is conclusive on the facts in issue, and cannot be disturbed.

2. The principles of law, decided by the court, are justly made.

MARTIN, J. delivered the opinion of the court.

The defendant, sheriff of the parish of Jefferson, from whom damages were claimed, for the seizure of some cattle of the plaintiff's, under a writ of execution against Durand, demanding the dismissal of the suit, on the ground that the plaintiff, on the execution by whose directions the cattle was seized, had not been made a party.

This exception being overruled, the defendant pleaded the general issue, that the cattle were really the property of Durand, and in his possession; that no opposition was made to the sale, at which the cattle were sold for the full value; that the plaintiff sought to cover Durand's property, from the effect of the execution of a creditor of the latter.

The plaintiff had a verdict and judgment; and appealed after an unsuccessful effort to obtain another trial.

His counsel has contended, in this court, that the *Code of Practice*, 398, has provided a particular course to a person whose property is seized, on an execution against another;

and all other modes of relief are expressly repealed; that this course is to pray for an injunction, in order to stop the sale.

It is true, all former rules of practice, other than those authorised by the new Code, are repealed: but the rules of practice are the means of instituting and defending actions, and the new Code does not deprive by implication, any individual, (in cases in which a right to two distinct actions existed before the *Code of Practice*,) of the exercise of either, though that statute may have detailed a specific course in the prosecution of the other.

In a case like the present, the party whose property was illegally taken and sold, had his remedy in damages against both the sheriff and the plaintiff in the execution, or either of them, or might regain his property by an action against the latter, in which the sale of the property and its restoration might be obtained, as he might re-vendicate in the hands of the purchaser. The Code, *loco citato*, has provided but the mode of obtaining the injunction; but it is clogged with the necessity of giving security, which the injured party may be unable to procure. Can it be said that this provision dissolves his right to demand damages from the sheriff, as the plaintiff in the execution? The judge *a quo* has correctly solved the question by the negative.

The counsel has next urged that the cattle were in the possession of Durand, who was exercising acts of ownership over them, and the law therefore regarded him as the owner, till a better title was shown and proven. Reliance is placed, as to this, on the *Civil Code*, 3417. It is true, possession either in good or bad faith, prevents the holder from being dispossessed till the legal owner claims and establishes a better right. The article of the Code which contains this provision, is intended to *protect* the possessor. It cannot be tortured into a provision authorising the creditor of the borrower or lessee, to sell the property of the lender or lessor for the debt of the bailee of either.

The counsel avers, that as the sheriff, having seized the cattle, on the execution of Prendergast, would have subject-

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All former rules of practice not sanctioned by the Code of Practice, are repealed.

If a party before the adoption of the Code of Practice had the right to two distinct actions, the Code does not impair that right, although it details a specific course as to one of them.

If the sheriff illegally seize and sell on execution, the property of a third person, the latter has his remedy, both against the sheriff and the plaintiff in execution, or either of them.

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ed himself to an action, if he had surrendered the cattle to the present plaintiff, who neither proved nor produced any title. If it be so, the sheriff had a strong reason to decline seizing the animals till he had satisfied himself they were the property of Durand. It is in evidence that before the removal, and afterwards before the sale, the defendant was warned by the plaintiff, who acquainted him with his right.

The plaintiff's counsel asserts that he has proven, as appears by the verdict of the jury, that the cattle were his property, and that he leased a lot of ground, on which they were seized, to the wife of Durand, (he having some time before ceded his property to his creditors,) with the cattle, Durand having before been the lessee of the premises and the cattle; that the possession of that woman was that of the plaintiff's, and the defendant is without an excuse for having violated that possession.

The counsel for the defendant, has suggested that the jury came to an erroneous conclusion on the examination of the testimony; that it appears Durand's wife was to have the cattle on the same terms as an anterior lessee, *i. e.* was to have them at thirty-five dollars a head, on paying for any of them, and was to pay for any of them that might die during the lease; that therefore she was the owner of the cattle, the contract being one of *sale* which is completed, as soon as the terms are agreed upon and before payment.

It has appeared to us, the contract was one of lease, with the faculty of *purchasing* during the continuance of the lease, at a given price; the principle *res perit domino*, has been invoked by the defendant's counsel, to show that the plaintiff had ceased to be the owner, since the lives of the animals had ceased to be at his risk.

We think the jury may well have concluded, that the faculty to purchase, might have ripened into a sale, by the payment of the price; but that till it was thus exercised, no title passed out of the plaintiff.

A bailee is not
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It is true, the owner is the person on whom the law casts the loss of the thing destroyed; but the law does not recognize as owner the bailee, who by a clause of the bailment

has undertaken to indemnify the bailor, for the loss of the thing bailed, if it perishes during the bailment; the borrower of a horse, often engages to take such a risk on himself, as an evidence of his intention to use him well and not to over ride him.

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Lastly, the damages are complained of as excessive, being much beyond both the value given by the appraisers and the price they sold for. The jury appear to have taken for their guide, the price which the plaintiff had stipulated and his lessee had agreed to pay, on the exercise of the faculty of purchasing. This was a point, of which a jury is peculiarly the proper judge, and the District Court, on the motion for a new trial, did not think it just to submit the case to another jury. Neither do we.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, in both courts.

LANCLOS vs. ROBERTSON.

**APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE THEREOF
PRESIDING.**

When the appeal appears to be frivolous and for delay, ten per cent. damages will be given.

This suit has once been before this court on exceptions to certain interrogatories propounded to the plaintiff by the defendant. The cause was remanded, with directions to the court below to overrule the exceptions. *Vide 3 La. Rep. 259.*

On the second trial, the court considered the plaintiff's demand established, and that the defendant had failed

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to prove the allegations in his answer, and judgment was rendered accordingly.

A new trial was refused, and an appeal was taken by the defendant.

Herron and Ives, for appellant.

Labauve, for appellee.

1. This case must be governed by the law previous to the new Civil Code; the court *a quo* erred in receiving parol evidence to prove a disturbance; the plaintiff relies on the grounds set forth in the bill of exceptions, to resist such testimony.

2. The sale took place under the old Code, and the defendant has not shown a shadow of disturbance, nor even the danger of one.

3. This appeal is only taken for delay; there is no ground for it, the law is clear. *Old Civil Code*, p. 360, art. 85. *Martin* 7, O. S. p. 223. 7 N. S. p. 235. According to these authorities, what necessity is there to call on this tribunal to repeat their decisions?

The opinion of the court was delivered by **MATHEWS, J.**

This case was before the appellate court during the January term of 1832, and was (after reversal of the judgment of the District Court, which had been previously rendered,) remanded for a new trial, in order that certain interrogatories which had been propounded by the defendant, should be answered by the plaintiff. Before the second trial, these interrogatories were answered; and on this trial, other testimony was adduced by the defendant, against whom judgment was pronounced, and he took the present appeal.

A bill of exceptions is found in the record to the introduction of parol evidence offered on the part of the defendant, and admitted by the court, to prove want of title in the plaintiff to the land sold to the former, which was the con-

sideration of the promissory note, on which the present action is based.

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But, as we agree in opinion with the judge *a quo*, on the effect which ought to be given to the whole testimony of the cause as received, it is unnecessary to examine this part of the case.

HIRIART
vs.
MORGAN.

The plaintiff's answers to the interrogatories do not prove any of the facts alleged in the answer of the defendant, in avoidance of his obligation to pay the sum stipulated in his written promise; (at least no material fact is established by these answers,) neither does the parol evidence adduced on the trial of the cause, establish these facts.

The appellee, in his answer to the appeal, has prayed for ten per centum damages, and the only question in the case is, whether this claim shall be allowed?

When the appeal appears to be frivolous and for delay, ten per cent. damages will be given.

The appeal appears to be frivolous, and for delay only.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, and ten per centum on the principal sum adjudged to the plaintiff as damages.

HIRIART vs. MORGAN.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

To subject a proprietor of land for levee made on it under proceedings of the Parish Police, its authority must be strictly pursued.

No provision by law exists respecting the manner in which the curator *ad hoc* and attorney appointed by the court, shall be paid for defending absentees on attachments.

This action was brought to enable plaintiff to seize and sell the land of the defendant, in order to pay the expense of

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public works on the land. The execution of the work had been adjudicated by the public inspector of roads and levees to the plaintiff; and the *process verbal* of the adjudication had been duly recorded in the book of mortgages, by which a mortgage was created on the land for the payment of the price of the work.

The plaintiff averred performance of the work agreeably to the engagement, and prayed the land might be seized and sold, and his claim satisfied out of the proceeds.

The order of seizure and sale was granted, and the defendant appealed to the District Court. He there pleaded *res judicata* to the demand. The court decided that the regulations of the police jury had not been duly promulgated, and that the inspector had not fully complied with the requirements of the regulations. The order granting the seizure and sale was rescinded, and from this decision the plaintiff appealed.

Ogden, for appellant.

Cooley, for appellee.

The opinion of the court was delivered by MATHEWS, J.

This suit was commenced in the Parish Court of Point Coupee, by an order of seizure and sale obtained by Morgan, as undertaker, to make a levee in front of a certain tract of land belonging to the defendant, a non-resident of the parish; the work having been adjudicated to the former in pursuance of police regulations of the parish of Point Coupee.

The order was obtained under an act of the legislature, approved on the 8th of February, 1831; an appeal was taken by the defendant from the Parish to the District Court, where the cause was tried *de novo*, and judgment being rendered against the original plaintiff, he appealed, &c.

The order of seizure was opposed on the ground of irregularity in the proceedings by which the work was adjudicated to the appellant.

It is clear, from the evidence of the case, that the police regulations were not strictly pursued. The adjudication, in the present instance, was made under ordinances passed in September, 1831, which seem not to have been properly promulgated previous to the time when the making of the levee on the land of the appellee was let to the undertaker; and notice, such as is required by the seventeenth section of these ordinances to non-residents, was not given to the former.

The legal principles which ought to govern the present case, do not materially differ from those adopted in that of *Bouligny vs. Dormenon, et al*, reported in 2 N. S. p. 455. In that case, we held it to be necessary, in order to subject proprietors of land whereon levees are required to be made, to the payment of expenses incurred under proceedings of the parish police; that strict compliance with all regulations which permit an interference on the part of the parochial authorities in relation to the private property of individuals, should be shown. And there exists (perhaps) stronger reasons for applying the same principles to the case now under consideration, when we take into view the summary remedy allowed by the act of 1831.

The only question of any difficulty which is presented by the cause, relates to an allowance made to the attorney appointed to represent the absentee. He claimed three hundred dollars; and the judge of the District Court granted to him two hundred, and taxed this amount as costs against the plaintiff. The decisions of this court, in cases somewhat similar, appear to be against the pretensions of the advocate in the present instance. Those decisions were made in reference to curators *ad hoc* and attorneys appointed to represent and defend absentees in cases of attachment. In such cases the law makes no provision respecting the manner in which the curator or attorney shall be paid for his services. See art. 57 of the L. C. and articles 964, and 260 of the C. P. Also the case of *Pontalba vs. Pontalba*, 2 L. R. p. 466. But the act of the legislature, in pursuance of which the advocate was appointed in the present case, provides, expressly, the mode in which he shall obtain compensation. The fifth

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To subject a proprietor of land for levee made on it under proceedings of the parish police, its authority must be strictly pursued.

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section of the law which entitles the undertaker to an order of seizure and sale, makes it the duty of the judge, in cases of non-residency, "to name an attorney for the non-resident, upon whom service shall be made as provided for in executory proceedings by the *Code of Practice*; and said attorney shall be entitled to such compensation as said judge may think proper, to be taxed as part of the costs.

The general rule with regard to costs, requires that they should be borne by the party cast in a suit, and they are so taxed in ordinary cases. It is true, that the amount to be levied in most instances, is expressly specified by law; and it would probably be well that such specification should be made in all cases, according to the maxim which considers laws the best which leave least to the discretion of judges. The law, however, under which the advocate claims compensation in the present case, seems to leave the amount to be allowed as costs, entirely to the discretion of the judge; but this circumstance does not, in our opinion, take the matter out of the general rules by creating an exception; and as the plaintiff has entirely failed in his action, all the costs of proceedings were properly imposed on him. The sum taxed we do not consider unreasonable.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

NEWTON ET AL vs. TURNER ET AL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

The defendant sued as the maker of a promissory note, cannot inquire whether the plaintiff, who has the legal title, is the owner, or his agent.

But such defendant can make such inquiry when he has substantial grounds of defence against the payee, and an attempt is made by fictitious assignment to deprive him of them.

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This action was brought by the endorsers of a promissory note against the drawers. The defendants deny that the plaintiffs are the owners of the note, and allege indebtedness on the part of the real owner to the defendants.

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January, 1893.
NEWTON ET AL
vs.
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Interrogatories were propounded to the defendants, which, if affirmatively answered, would establish the allegations of the answer. The plaintiffs excepted to those interrogatories as immaterial, and upon several other grounds. The court sustained the objection on the first ground.

The cause was tried and judgment was given for the plaintiffs, from which, after a motion for a new trial had been overruled, the defendants appealed.

Labauve, for appellants.

1. The exceptions to the interrogatories propounded by defendants to plaintiffs, were wrongfully sustained.

2. The defendants, under the pleadings, had an undoubted right to the answers of the plaintiffs. 8 N. S. p. 558. 2 La. Rep. p. 263.

3. The endorsement and protest could not exclude proof that Campbell was still the owner of the note.

4. The affidavit made by Turner, annexed to the interrogatories, was sufficient in law.

Burke and Davis, for appellees.

1. The exception to the interrogatories was properly sustained. 9 Martin's Rep. 344. 3 N. S. 164, 291, 392.

2. The note was endorsed before maturity, and the endorsement duly notified to the drawers.

3. The claims set up in the answers of defendants, was on the face of it subsequent to the endorsement and protest. Rec. p. 3. *Ibid*, p. 4.

4. The appeal is taken for delay. Code Practice, art. 907.

PORTER, J. delivered the opinion of the court.

The plaintiffs, endorsers of a promissory note executed by the defendants, sue them to recover the amount thereof, with interest and costs of protest.

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NEWTON ET AL
VS.

TURNER ET AL.

The answer denies that the plaintiffs are the owners of the note; and avers, that it is still the property of Campbell, the payee. Compensation is also pleaded in a note of Campbell's, and an account due by him to the defendants.

Interrogatories were annexed to the answer, calling on the plaintiffs to swear whether they were the true and *bona fide* owners of the note; at what time it was transferred to them; and whether Campbell, the payee, was not still the true proprietor of the instrument sued on.

These interrogatories were excepted to; because they were not pertinent; because the note sued on has the endorsement of the payee, which gives the plaintiffs a complete right of action; because the answer contains no allegation that the note was endorsed after maturity; because the note was protested for non-payment before the debts now pleaded in compensation had been due, and even before one of them had been contracted; because the defendants have notsubjoined the proper affidavit to their interrogatories; and, finally, because neither the execution of the note, *nor its nullity*, (we presume, *its validity*, was meant,) is called in question.

The court sustained these exceptions, on the ground of the immateriality of the interrogatories, and judgment being given against the defendants, they appealed.

The defendant sued as the maker of a promissory note, cannot inquire whether the plaintiff, who has the legal title, is the owner, or his agent.

The doctrine contended for by the plaintiffs, which has been sanctioned by several decisions of this court, we believe correct. The maker of the note, when sued, has not the right to inquire whether the plaintiff, in whom the legal title to the instrument is vested, be the agent or the owner of it. Because, whether he be the one or the other, is immaterial to the defendant, for a judgment in favor of the party, who *ex facie* has the title to the note, will protect him against a demand against any other person. But, this rule has its exceptions, as we stated in the case of *Banks vs. Eastin*, and one of these is where the defendant has substantial grounds of defence against the payee, of which he apprehends an attempt is made to deprive him by a fictitious assignment. In this case, the answer sets up what would be a good de-

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fence against the payee, and it charges the assignment to be false and fraudulent. It, therefore, comes clearly within the exception just stated, unless a distinction taken by the counsel for plaintiffs, should be found correct. 3 N. S. 291, 392.

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It is contended, that as the debts now pleaded in compensation were not acquired until after the endorsement of the note, the assignment could not have been made to deprive the defendants of any just defence, to the instrument sued on; and, consequently, they have no right to put the interrogatories. The position assumes that the authority of the defendants to go into the inquiry, as to the real ownership of the note, depends on their having a defence against the payee, at the time of the transfer, and that this transfer was made to deprive them of the defence. We are not aware of any authority, or sound reason, on which the right can be so limited. As strong an inducement for such fictitious transfers, may exist in the apprehension the debtor will acquire obligations of the plaintiffs, as he will set off those already acquired. The fictitious assignment cannot deprive the defendants of rights which they would have had, had that assignment not been made; if the plaintiffs are but the agents of the payee, the case must be open to every defence against them, it would be against him.

But such defendant can make such inquiry when he has substantial grounds of defence against the payee, and an attempt is made by fictitious assignment to deprive him of those grounds of defence.

The defect in the affidavit, which is alleged in the bill of exceptions, was not relied on in argument; and on looking into the record, it does not appear to us tenable.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered and decreed, that the cause be remanded to the district judge, with directions to him to overrule the exception filed to the defendants' interrogatories; and it is further ordered, the appellees pay the costs of this appeal.

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January, 1833.

HEBERT vs. JOLY ET AL.

HEBERT
vs.
JOLY ET AL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

On a motion to dissolve an injunction on the face of the papers, all the facts stated are not admitted as true, unless the motion be made on the ground of a want of sufficient matter alleged in the petition to authorise the issuing of the writ.

An affidavit for an injunction must be direct, positive and unconditional.

This action is brought to obtain a perpetual injunction upon the proceedings on a judgment rendered against the plaintiff. Joly, a defendant in this suit, and the plaintiff in the former one, had, in 1827, purchased a slave at a public sale of the estate of his deceased wife, and in a few days afterwards he subrogated the plaintiff to all the rights and interest he had acquired by the purchase. By the said act of subrogation, the plaintiff assumed the obligations of Joly, in regard to the payment of the slave, who was mortgaged for that purpose.

Joly afterwards sued and obtained judgment against plaintiff for the price of the slave. Plaintiff alleges, that when the former suit was brought, he was, under error of fact, induced by Joly; that the legal representatives of Joly's deceased wife now claim of the plaintiff the price of the slave.

The defendants filed a plea of *res judicata*, and moved to dismiss on the face of the papers. The court sustained the plea, dissolved the injunction, and awarded fifty dollars damages against the plaintiff and his surety, jointly.

After an ineffectual motion for a new trial, the plaintiff appealed.

Labauve, for appellants.

1. Ursin Joly, defendant, failed to make out his plea of *res judicata*, and the court wrongfully sustained it.

2. The plaintiff, Hebert, shows fraud on the part of Joly, defendant. *C. C. art. 1841, nos. 5, 6, 7*; and that it is but since the judgment that his error and the fraud were discovered and made known to him by the true representatives.

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3. The plaintiff shows a good reason to fear a disturbance; the negro being mortgaged. *C. C. art. 2535*. The false representations of defendant prevented him from making the defence before, in inducing him to believe Joly duly authorised to receive and discharge on all parts.

4. The surety on the injunction bond was wrongfully condemned to cost.

Burk and Davis, for appellees.

The injunction must be dissolved—because

1. The proceedings in injunction are informal. *Code Practice, art. 304. Act of March 25, 1828, sec. 3 and 18. Code Practice, arts. 574—5. 3 La. Rep. Code Practice, art. 739, 746 to 750, 593. La. Code, art. 3522, no. 9.*

2. The law does not authorise the judgment debtor to enjoin in this case. *Act of March 25, 1828, sec. 2 and 9. Code Practice, art. 298, no. 7, art. 300, art. 301.*

3. Judgment of Ursin Joly has the force and effect of the thing adjudged. *Code Pr. art. 593. La. Code, art. 2066.*

4. Twenty per centum interest as damages should be allowed. *Code Practice, art. 592. Act of March, 1831, sec. 3.*

5. Ten per centum damages for frivolous appeal. *Code Practice, art. 907.*

PORTER, J. delivered the opinion of the court.

This case commenced by an application for an injunction. The plaintiff states that he bought from the defendant, Joly, a slave which the latter had acquired by adjudication, at the sale of the estate of one Celeste Cullue, and by his contract, agreed to take the place of his vendor, and make payment to the person or persons legally entitled to receive it.

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The petition proceeds to state various circumstances, on which the injunction is demanded, and concludes with a prayer for it. At the bottom is found the following affidavit. "Eribert Hebert, being duly sworn, deposes and says, that the facts and allegations contained in the above petition, which render an injunction necessary, are true and correct."

A motion was made in the court below, to dissolve the injunction, on a plea of *res judicata*, and from matters appearing on the face of the papers. The court sustained it, and the petitioner appealed.

On a motion to dissolve an injunction on the face of the papers all the facts stated are not admitted as true, unless the motion be made on the ground of a want of sufficient matter alleged in the petition to authorise the issuing of the writ.

It has been objected, that on a motion to dissolve on the face of the papers, all the facts are admitted as true. We think not. Such certainly would be the case, if the rule had been taken to show cause, for want of sufficient matter being alleged in the petition to authorise the writ. But the case before us was tried on a motion to dissolve from matters appearing on the face of the papers. Whatever, therefore, appeared on the face of the papers, which showed the injunction should be dissolved, was a proper matter of inquiry. Whether the petitioner might not have objected to going into the investigation, unless the defendant set out specially, his particular exceptions, need not be inquired into, for no objection was made by him on this ground, in the court below.

An affidavit for an injunction must be direct, positive and unconditional

The affidavit is not such as the law requires. The oath should be direct, positive and unconditional. If in the present case, the facts did not render the injunction necessary, none were sworn to. If the law did render it necessary, on the allegations in the petition, still it is an affidavit, conditional, on the law being so. Independent of the complete exemption from punishment, which would attend false swearing, if the petition did not disclose matters to authorise the writ, there would be, in all indictments for perjury, on such an oath, a preliminary inquiry, whether the allegations authorised an injunction; and in which inquiry the party accused would have the benefit of all doubt, which might exist in the matter. The law in our judgment, did not contemplate extending any such latitude, or embarrassing any

inquiry which should turn on the truth of facts, into mixed questions of fact and law.

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The plaintiff most probably was induced to give his affidavit this form, from the provisions contained in the 304th article of the Code of Practice, which requires the party applying for an injunction, to state, under oath, the facts, which according to his belief render the writ necessary. This we think evidently means, that the facts must be sworn to positively, and that the facts so attested to, must be those, which in the belief of the affiant, authorise the injunction, but this is widely different from an averment, that *all the facts which render the writ necessary*, are true.

Error is alleged in that part of the judgment below, which condemns the surety to pay costs. The surety has not appealed, and is not before this court: then again, the act of 1831, declares that the surety shall be considered as a party plaintiff in the suit. *Act of 1831, p. 102.*

Damages are asked for the appellee, on the ground of the appeal being frivolous. We do not think the case one in which this penalty should be inflicted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

MYERS vs. SLACK.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE THEREOF
PRESIDING.

Although three juries have returned similar verdicts, if the Supreme Court cannot agree with them on the facts, the cause will be remanded.

The plaintiff seeks to recover one thousand dollars for his slave, who was drowned while hired by the defendant. The

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plaintiff alleges the slave was hired on an agreement, between the parties, that he should be engaged at the whip saw. During the time he was in the defendant's service, under this contract, the slave was drowned. He was dispatched by the defendant in a skiff, with a white man, to the Bayou Plaquemine, and while on his return, some accident occasioned his death.

The defendant denied the plaintiff's right of action, and the allegations and facts of the petition.

On the trial, the defendant excepted to a decision of the court, rejecting proof offered by him, that the slave had, while on his errand to the Bayou Plaquemine, obeyed a command of the plaintiff.

The jury returned a verdict for the plaintiff, for the sum of seven hundred dollars.

The defendant moved for a new trial, on the following grounds: 1. The court erred in rejecting the testimony offered by defendant. 2. The verdict is manifestly contrary to law and evidence. The motion was sustained and a new trial was granted.

The defendant next amended his answer, by averring facts tantamount to the plaintiff's consent and approval of his conduct, in sending the slave on the errand. A second jury was empannelled, but, after hearing the evidence, could not agree on a verdict.

A third jury, to whom the cause was submitted, were unable to agree.

On the fourth trial, a verdict was returned in favor of the plaintiff, for seven hundred and fifty dollars.

A new trial was granted, and of the fifth jury, empannelled to try the cause, eleven agreed, and by consent of the parties, a verdict was accordingly entered in favor of the plaintiff, for six hundred dollars.

A motion by defendant for a new trial, on the ground that the verdict was contrary to law and evidence, was overruled. The defendant appealed.

Labauve, for appellant.

1. It was a special stipulation on the part of the plaintiff, that the negro Joe should come from time to time, to the river.

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2. It is shown that he must come by water, and that Myers requested Ross to let him come out with him when he would.

3. Myers ratified and consented to the trip, gave himself a dangerous commission to Joe, thereby converting partly the services of Joe, to his benefit.

4. Ross, in that trip, was as much the agent of Myers as of Slack.

5. It is not shown that Joe was drowned in consequence of the trip; the boat was made fast at shore.

6. Myers gave to Joe the means of his death, and no one but him ought to suffer.

7. There is on the part of Slack, no fault, no negligence; what he did was according to the contract, as well as with the consent of Myers. Slack acted as a good father of family.

8. The jury did not decide the case on mere points of facts, the liability of Slack is entirely based on a point of law, to wit: Is Slack responsible for the loss of Joe?

9. The verdict is clearly contrary to law and evidence.

Burk, for appellee.

PORTER, J. delivered the opinion of the court.

This action is brought to recover from the defendant, the value of a slave, hired by the plaintiff to the defendant. The petition charges, that the negro was used for other purposes than those contemplated by the contract, and that in consequence thereof, he was lost.

The answer puts at issue, the allegations in the petition, and also avers, that the consent of the plaintiff was given to the employment of the slave, in the business which is now charged as a deviation from the contract.

The case appears to have been tried five times by a jury. There have been three verdicts for the plaintiff, and twice

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no verdict was given, in consequence of the jurors not being able to agree.

The judges who granted the new trials, on the ground of their being contrary to law and evidence, of course differed with the juries. The judge who sat last on the case, declared he was not satisfied with the verdict, but that after such repeated expressions of the opinions of several juries, he did not feel authorised to set aside the last verdict. Judgment was accordingly given for the plaintiff, and the defendant appealed.

There is not much contradiction in the evidence. It appears pretty clearly, that the slave was hired as a sawyer, and that there was no express understanding he was not to be employed at other work. The parties stipulated, that once every two weeks, the slave should have permission to come from the defendant's plantation, to Plaquemine, to visit his wife. The nature of the country prevented this visit being made any other way than by water. A week previous to the time at which the slave should have made this visit, the defendant had occasion to bring some articles from Plaquemine, and he sent the slave in a skiff, accompanied by a white man, to bring them. The plaintiff lived on the Bayou, and the skiff necessarily passed before his door. It stopped there on the way up, and the plaintiff understanding where and on what errand the slave was sent, gave him directions to procure a jug of whiskey, and leave it at home as he returned. The whiskey was obtained according to the master's directions. On descending the Bayou Plaquemine, the white man, already mentioned, and the slave stopped at the house of one Placide. The former went and slept in the house all night. He swears he endeavored to induce the slave to leave the skiff, but he could not persuade him to do so. In the morning the negro was missing, and a few days after, his body was found in the bayou.

There are several other circumstances proved, not necessary to be noticed, and several sworn to, which are either contradicted by other witnesses, or rendered doubtful from circumstances which need not be stated at length.

We have examined this case with anxiety, to find in it facts, which would authorise us to agree with the verdict, and affirm the judgment below. We have been unable to discover any thing, which permits us to do so. If the verdicts of the juries be correct, it must be on matters of which they had a knowledge, and which do not appear on record. On such knowledge we cannot act. We think the best course to pursue with the case, is to remand it for a new trial.

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January, 1833.

DONAVAN
vs.
MOONEY.

Although three juries have returned similar verdicts, if the Supreme Court cannot agree with them on the facts, the cause will be remanded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, and it is further ordered and decreed, that this cause be remanded for a new trial, the appellee paying costs of this appeal.

DONAVAN vs. MOONEY.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

On the rescision of a sale, the vendor becomes entitled to interest from the time he delivers or tenders to the vendor the property.

This is a redhibitory action to rescind the sale of a slave, and recover the price paid. The slave was purchased by public act, and warranted by the defendant against all the vices and maladies prescribed by law. Plaintiff alleges the slave was at the time of the sale, so diseased as to be unable to labor, and that the slave was a thief. Damages for expenses, incurred on account of the slave, were claimed by the plaintiff.

The general denial was pleaded, and the court, after hearing evidence, rendered a judgment in favor of the plain-

EASTERN DIS. tiff, for the price, with interest from the day of judicial
January, 1833. demand, until paid. The defendant appealed.

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Preston, for appellant.

Nixon, for appellee.

MARTIN, J. delivered the opinion of the court.

This is a redhibitory action, on the ground of the slave sold, being addicted to running away before the sale. The general issue was pleaded.

The District Court gave judgment for the plaintiff, for the price paid for the slave, and three dollars paid for taking it, with interest from the judicial demand.

The plaintiff's claim appears to us to have been fully established, but the defendant's counsel has contended, that interest was improperly allowed.

On the recision of a sale, the vendor becomes entitled to interest from the time he delivers or tenders to the vendor the property.

Had interest been allowed before the suit was brought, we should have thought the plaintiff, having had some service from the slave, could not claim any thing from the absence of his money, but on the recision of the sale, the parties must be placed in the situation in which they were before it, and this cannot well be, unless the vendee receives back the price at once, or with interest till paid, and to this he becomes entitled, when he delivers or tenders the property.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

MONTREVILLE ET AL. vs. ROBERTSON.

EASTERN DISTRICT,
January, 1883.MONTREVILLE
ET AL.
vs.
ROBERTSON.APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

Where the matter is properly cognizable by a jury, although the evidence be doubtful, their verdict will not be disturbed.

The plaintiffs claim eight hundred and forty-four dollars and fifty cents, for labor done for the defendant, in pursuance of a written contract between the parties. The plaintiffs also claim the said sum on a *quantum meruit*, and also claim a privilege on the sugar house of the plaintiff, for the sum due.

A judgment by default was taken, which was set aside, and exceptions filed to the want of residence, to a misnomer of the parties in the petition. The exceptions were sustained and the petition was amended.

The defendant pleaded the general denial, non-fulfilment of the contract by plaintiffs, and payment.

The cause was tried by a jury, who found a verdict for the plaintiffs, and the defendant made an unsuccessful motion to obtain a new trial, and appealed.

Burk and Davis, for appellants.

1. There is a contract, and it has not been complied with.
La. Code, arts. 1831, 1883.

2. The plaintiffs' demand, is wholly unsupported by proof.
Code of Practice, art. 442, et seq. art. 458.

3. The amount of the injury found, exceeds the amount of the plaintiffs' claim. *La. Code*, art. 1924, 6 *Toullier*, No. 338.

4. The payment admitted, of record, is a full compensation for any work done by plaintiffs.

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MONTREVILLE
ET AL.

VS.
ROBERTSON.

5. The damage occasioned by the plaintiffs neglect and unskillfulness, must be deducted from the price of any work they may have proved.

Labauve, for appellee.

1. The verdict of the jury is strongly supported by the evidence, they gave justice to the parties after hearing the testimony from the lips of the witnesses, they decided entirely on matters of fact, and this court cannot interfere with such a verdict.

2. The judge *a quo* who assisted the jury, and who heard the witnesses, was satisfied with the verdict, and refused to grant a new trial.

3. There is no reasonable ground for the appeal, which was taken merely for delay, and to retard the payment of a just debt for labor, due for two years without interest, and which carries none yet. This is a very case for ten per cent. damages.

MATHEWS, J. delivered the opinion of the court.

This is a suit on a *quantum meruit* for work and labor performed by the plaintiffs, as carpenters for the defendant. He pleaded in his answer, payment and defects in the work. The cause was submitted to a jury, who on the testimony adduced, found a verdict in favor of the plaintiffs, for six hundred and six dollars and forty-five cents, subject to a reduction on account of payments, and on this verdict a judgment was rendered for four hundred and seventy-eight dollars and twenty-eight cents, from which the defendant appealed.

Where the matter is properly cognizable by a jury, although the evidence be doubtful, then verdict will not be disturbed.

The case (according to the pleadings on record) involves no questions of law. Although the evidence might raise doubts, as to the sufficiency of the workmanship, yet this was a matter properly cognizable by the jury, and it does not appear to us, that they erred in their conclusion on the facts.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

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DUTTON vs. DUPUY ET AL.

DUTTON

vs.

DUPUY ET AL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE

DISTRICT PRESIDING.

It is unnecessary for a party applying for an injunction, to swear that the facts set forth, render an injunction, in his opinion, necessary.

A new trial annuls the execution on the former judgment.

This suit was brought to stay proceedings, until further order of the court, under a writ of *feri facias*, alleged to have been illegally issued against the plaintiff, and likewise to suspend the sale of the plaintiff's property, already seized under said writ. The suit was brought against the sheriff, who had executed the writ by the seizure, and the plaintiff in the suit in which it had been issued.

Judgment was rendered in the former suit, on the second day of November, 1831, being the last day of the session of the court for that term. The writ issued on the thirteenth day of January, following. Three judicial days had not elapsed between the rendition and the signing of the judgment.

An injunction issued agreeably to the prayer of plaintiff's petition, and a motion to dissolve was made by the defendants, on the following grounds of error, apparent on the face of the record. 1. The plaintiff's action is groundless in the premises, in the form and remedy. 2. Insufficient showing and affidavit. The court dissolved the injunction, and condemned the plaintiff and his surety, jointly, to pay the defendant (the sheriff) ten per cent. per annum, on the amount of the judgment.

A motion for a new trial was refused, and the plaintiff appealed.

Labauve, for appellant.

1. The judgment below is erroneous on the face of the record.

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DUPUY ET AL.

2. The plaintiff's showing was sufficient in law, to sustain the action. The plaintiff clearly showed that the judgment was signed the same day of its rendition, that three judicial days had not elapsed when the execution issued, and that judgment was not yet final. Plaintiff had a right to move for new trial at the next term. 7, *N. S. p. 233.*

Burk and Davis, for appellees.

1. The oath is insufficient. *Code of Practice*, art. 304.
2. Petition shows no cause of action. 5. *N. S. 344.*
3. Appeal is frivolous, and taken for delay. *Code of Practice*, 907.

MARTIN, J. delivered the opinion of the court.

The plaintiff complains of the dissolution of an injunction he had obtained, to stay the execution of a judgment pronounced and signed on the last day of a term.

The counsel for the appellee, has contended that the injunction had been improperly obtained, as the applicant had not made oath, that the facts stated in the petition, rendered, in his belief, the injunction necessary. Further, that, as the judgment was rendered on the last day of the term, a new trial ought to have been moved for, before the court adjourned. *Code of Practice* 904, 5 *Martin*, *N. S. 244.*

It does not appear to us, that either of these grounds, authorised the dissolution of the injunction.

It is unnecessary for a party applying for an injunction, to swear that the facts set forth, render an injunction, in his opinion, necessary.

The Code does indeed require an oath of the truth of the facts, which in the applicant's belief, render an injunction necessary. When he has done so, the magistrate applied to, is judge of this necessity, and it does not appear to us, that the Code requires him to be informed, that on the applicant's belief this necessity exists.

The case cited from the new series, was, we believe, that of a judgment rendered before the Code of Practice went into operation, as the court refers to a provision in 2 *Martin's Digest*, which the Code has repealed. The deci-

sion is of 1826, and there was no session of the Supreme Court at Alexandria in 1825.

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Although the injunction appears to have been improperly dissolved, we think that justice requires that the case should be remanded, in order that it may be ascertained, whether a new trial was granted at the term following that on which the judgment was rendered. For if a new trial was had, the judgment on which the execution stayed, issued, has lost its effect, and it would be idle to dissolve the injunction staying its execution, because the party would certainly, after the dissolution, be entitled to another injunction.

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A new trial annuls the execution on the former judgment.

The case was not heard below on the merits, but on exceptions taken to irregularities, apparent on the face of the paper; whereby the appellant had not the opportunity of going into the merits of the case: showing, if such were the fact, that a new trial was obtained, and by placing these facts on the record, entitling himself to relief at our hands.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, reversed and set aside, and the case remanded, with directions to the judge, to proceed thereon, according to law, the appellee paying costs in this court.

UNION BANK vs. M'DONOUGH ET ALS.

APPEAL FROM THE COURT OF THE CITY AND PARISH OF NEW-ORLEANS.

The right of a plaintiff, to propound interrogatories to the defendant, depends on the capacity of the former to maintain his suit.

Stockholders in a bank, can be reached only through those provided by the charter to represent them.

EASTERN DIS. A bank is responsible for the acts of the directors, refusing to permit an individual to subscribe for stock.

UNION BANK
VS.

M'DONOUGH
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An act which attempts to evade the provisions of the charter, can confer no rights on the party, by whom it was committed.

This action was brought by the Union Bank of Louisiana, to erase the subscriptions of the defendants, from the book of subscription of the bank. Damages were claimed of the defendants, for the injury sustained in consequence of the subscriptions.

The charter of the bank provides, that citizens of this state, and owners of land in this state, are the only persons who can subscribe for its stock. In case the subscriptions exceed the capital fixed by law, the excess must be deducted from the stock, for which sufficient security is not offered, and then from the largest subscription, so that no subscription shall be reduced, while a larger one remains.

The bank alleges, that M'Donough made simulated sales of his property to the other defendants, in order to enable them to subscribe for him. Sufficient security was offered on the subscriptions, exceeding, by several millions of dollars, the capital of the bank fixed by law. The directors passed a resolution, requiring those who, to secure their stock, offered property of which the titles were dated after the subscription book was opened, to make affidavit, that they were *bona fide* owners of such property, and that they had not subscribed with the view to favor the person who had passed them an apparent title.

The defendants refused to make the affidavit required by the directors. Interrogatories were annexed to the petition, to be answered by the defendants, under oath, in open court.

On the day fixed, the defendants did not appear to answer the interrogatories propounded to them. Judgment by default was entered, and another day fixed for defendants to answer the interrogatories.

Before this day arrived, an answer was filed, after setting aside the judgment by default. The defendants denied all simulation; denied the right of the bank to maintain the action or propound the interrogatories, and averred the subscriptions were legal, and had been received by the bank.

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The defendants failed to answer the interrogatories, and the court after hearing testimony, and taking time to advise, rendered judgment in favor of the bank. The defendants appealed.

Grymes and Mazureau, for appellants.

1. The bank in its corporate capacity, has no right to maintain this action. No injury can result to it in that capacity.

2. They have no right to propound the interrogatories annexed to their petition.

3. Admitting the subscription to have been made, in the manner, and for the purposes set forth in the petition, it is not against the charter, the general law of the land, or good morals.

4. That the contract was complete by the receipt of the subscription by the commissioners, and the exhibition of the titles at the time, and cannot now be annulled.

Denis, contra.

PORTER, J. delivered the opinion of the court.

By the charter of this bank, its capital is limited to a certain amount; and in case the sums subscribed, exceed the capital, the directors are required to deduct the amount of such excess, from—First, the stock of which sufficient security shall not be offered, and—Second, from the largest subscriptions in such manner, that no subscription shall be reduced in amount, while any remains larger.

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The petition states, that the subscriptions, for which good security have been offered, greatly exceed the amount of the capital, and that one of the defendants, has made false and simulated sales to the others, of property belonging to him; that he has procured subscriptions to be made on the security of his property in their names, but for his benefit, and that by these means he will obtain a greater proportion of stock, than if he had subscribed in his own name.

It concludes by a prayer, that these subscriptions be erased from the books of subscription of the bank, and that the defendants pay the sum of one thousand dollars, the damages sustained by the petitioners.

The answer denies any illegal contrivance, or simulation; denies that the directors of the bank can maintain this action; and avers, that the defendants have severally subscribed to the stock of said bank, and that by the acceptance of the subscriptions, on the exhibition of their titles, to the managers, charged to receive them, the contract was perfect, and binding on both parties.

There was judgment in the court below, for the plaintiff, and the defendants appealed.

Interrogatories are annexed to the petition, which, if answered in the affirmative, would establish all the facts on which this action is brought. As the defendants have declined answering them, the law draws the same conclusion from their silence, as it would from their avowal.

The right of a plaintiff to propound interrogatories to the defendant, depends on the capacity of the former to maintain his suit.

The legality of these interrogatories has been contested, but the right to propound them must necessarily depend on the capacity of the plaintiffs, to maintain the present action; for if they have that right, there is nothing in our law which refuses to them, the same means of establishing the truth of their allegations, which it accords to all other litigants.

That capacity, however, is denied, and as the case mainly turns on the correctness of this position, it has been very fully discussed at the bar.

It is one, however, which has not presented much difficulty to our minds. The first directors appointed under the charter, were the agents of all the subscribers, in admitting these

subscribers to become stockholders, on complying with the conditions, which the act of incorporation imposes. As the agents, or representatives of their principals, their acts must be considered, as the acts of the majority of those whom they represent. Stockholders in a bank can only be reached, in a court of justice, through those whom the charter provides shall represent them, because it is only the act of the majority which can carry into effect, or refuse the exercise of rights conferred by the act of incorporation. Hence, it follows, that if an action could not be brought against, or by the corporation, in a case, such as this, it could not be brought at all; or if brought, it could have no useful purpose. A decision between two of the stockholders, holding different interests in this matter, could not bind the corporation, who can only appear in court through the president and directors, and until a decision was made in a case where they were legally represented, the question of right could not be settled; for the decision of the board, rejecting the subscriptions, would still stand unaffected by a decree to which they were not parties. There is a case in the books, which bears no inconsiderable analogy to that now before us. It is that of *Gray vs. President, Directors & Co. of the Portland Bank*, and will be found reported in *3 Massachusetts Reports*, 364. By the charter of that bank, power was given to the original subscribers, to enlarge their capital at a future time. The plaintiff insisted, that he was one of those who were entitled by law, to a preference in subscribing for the new stock. The directors thought otherwise, and divided it among other persons. A special action on the case was brought, setting out these facts. The court held, that the bank was responsible for the acts of their agents, and that the plaintiff was entitled to recover from the corporation, the damages he had sustained, by the illegal act of those who had represented it. If the doctrine recognized by the court in that case be correct, as we apprehend it is, that the bank is responsible for the acts of the directors refusing to permit an individual to subscribe, it follows that the bank has the right to oppose any one improperly becoming a sub-

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Stockholders in a bank, can only be reached through those provided by the charter to represent them.

A bank is responsible for the acts of the directors, refusing to permit an individual to subscribe for stock.

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scriber, because the illegal admission of him would render the corporation liable to those, who in consequence of it, were rejected altogether, or admitted for a less sum than they would otherwise be entitled to. If the plaintiffs, instead of instituting this suit, had acted on the defensive, and compelled the defendants to resort to legal means to admit them as stockholders, there cannot be a doubt, that whether they resorted to a *mandamus*, or commenced an action, the proceedings must have been directed against the plaintiffs. They could not have selected any individual stockholder, whom they might suppose had an interest adverse to theirs, and made him defendant. If this proposition be admitted, it would seem to be equally clear of doubt, that the persons who could alone defend such an action, are the proper parties, plaintiffs, where a suit is instituted, which presents the same matters for decision.

It was contended, that the act of receiving the subscription, by the commissioners, and the exhibition of the titles to them, rendered the contract complete and binding on all parties. Under the charter of the Union Bank, we agree fully with the distinction taken at the bar, between *subscribers* and *stockholders*. The third section of the act of incorporation, expressly recognizes it, in relation to country subscribers, for it enacts, that the managers, after receiving the subscription, shall send the titles and documents to the city of New-Orleans, in order that the board of directors may finally decide on the validity and sufficiency of the titles so transmitted to them. The distinction is not made in such express terms, in regard to the city subscription, but we think it clearly results from the charter, that it was not the intention of the legislature, to rest the final decision of these matters with the commissioners who received the subscriptions in New-Orleans. The first section of the charter provides, that if there be an excess in the subscription list, the amount of that excess shall be reduced, first by striking off those who have not offered sufficient security; a provision which strongly implies that the admission of a person to subscribe, does not complete the contract, for it supposes, first, the case of a subscription, which

has been already received, and then provides that it may be rejected. If to this enactment, we add that found in the 24th section, that the board of directors shall be the judges of the sufficiency of the mortgages offered for the stock, and shall have the power to refuse or reject the same, if not sufficient, we arrive, without hesitation, at the conclusion that it was not contemplated the managers for receiving subscriptions, should decide finally on the sufficiency of the security offered.

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But it is contended, the directors have no power to take into consideration any other matter than the validity of the mortgages offered to secure the bank. That if they are sufficient, the board have no concern whether A or B be stockholders. It is true, no such power is expressly given by the charter, but the argument on this head, takes too limited a view of the duties of the directors and their responsibilities. They are bound, not only to carry into effect, the express directions of the charter, but all other matters, which fairly result from its purport and spirit. The act of incorporation, does not confine itself alone to obtaining good security for the stock subscribed. It extends its views further. It anxiously provides that as many persons as possible shall have the privilege to offer this good security, and obtain loans on it, and it carefully guards against a monopoly, by enacting, that if there be an excess, reduction shall be made by taking the highest on the list, so that no subscriber shall be reduced while any remains who has taken a larger proportion of the stock. This limitation is personal, and the acts of the defendants, if sustained by the court, would enable them to evade the law. For, by dividing the subscription nominally, among many, who acted for one, the party who owned the stock would not suffer the deduction he must be subjected to, had it all stood in his name. That which cannot be done directly, the law will not suffer to be done indirectly. Had the defendant, who procured those subscriptions, presented the facts which this action has disclosed to the commissioners, and required of them to admit four, or any number of individuals to subscribe for stock in their names, for his benefit,

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An act which attempts to evade the provisions of the charter, can confer no right on the party.

they could not have permitted him to do so, without a gross dereliction of duty. His case cannot be made stronger by an attempt to conceal the real state of things from them, and the laws of the country would be subject to a just reproach, if they sanctioned such an evasion of the statute.

In addition to the points filed in the cause, it was urged in argument, that if the court should decide the stock was illegally subscribed for, in the names of those who had lent their names to the owner of the property, that the proper decree would be, that the whole of it should stand in his individual name; but it is our opinion, that an act which attempted to evade the provisions of the charter, can confer no right on the party by whom it was committed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court, be affirmed with costs.

GRANNEAU vs. LANGLOIS.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

This court will not remand a cause because the testimony and affairs investigated are obscure, if there is no allegation that new evidence may be adduced.

Damages will not be given, unless it clearly appear that the appeal is frivolous.

The plaintiff sued on a promissory note. The defendant admitted his signature, but pleaded error, want of consideration, and fraud.

On the trial, the defendant attempted to prove various errors of fact in their business transactions previous to the time the note in question was given. He likewise at-

tempted to prove a partnership, and a joint interest with plaintiff in a certain schooner. The court decided that he had failed in his defence, and rendered judgment accordingly.

After an unsuccessful effort to obtain a new trial, the defendant appealed.

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Burk, for appellants.

1. The judgment of the court below must be affirmed with ten per centum damages.
2. This suit is brought on a plain note of hand, and the defendant entirely failed to make out his defence.
3. The note appears to have been given on a settlement of accounts between the parties, and for a balance due; there is no proof showing want of consideration and error; it was the duty of the defendant to explain, satisfactorily, that settlement to the court.

Labauve, for appellees.

MARTIN, J. delivered the opinion of the court.

The defendant, sued on his promissory note, pleaded it was given for the balance which he was, through error and by the fraud of the plaintiff, induced to recognize as due on a settlement of accounts. There was judgment for the latter, and the former appealed, after a vain attempt for a new trial, on the ground of the judgment being manifestly contrary to the evidence.

The case turns entirely on a question of fact. The inferior judge has expressed his opinion that there is much obscurity in the affair; that it lay with the defendant to explain it, and he did not do so satisfactorily. In this view of the case, we concur.

The defendant has now presented the obscurity of the affair, complained of by our learned brother, as a reason for our remanding the case for another trial. There is no allegation that any new evidence may be adduced, and as the arguments of the counsel have failed in dispelling the obscurity

This court will not remand a cause because the testimony and affairs investigated are obscure, if there is no allegation that new evidence may be adduced.

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Damages will not
be given unless it
clearly appear
that the appeal is
frivolous.

in the affair, there is little hope that any new argument might render the counsel's efforts more successful; especially as he might have the benefit of it in this court.

The appellee has prayed for damages as on a frivolous case. The case may be said to be a doubtful one, and we may believe the defendant believed he might be benefited by an appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BARROW. vs. CAZEAUX.

APPEAL FROM THE SECOND DISTRICT, THE JUDGE THEREOF PRESIDING.

If a vendor in his vendee's absence, promise a third person to pay the vendee the damages he had sustained by being ousted from the possession of the land, it is a confession, and binds the vendor.

A just cause of a promise is always understood unless the contrary be proved.

Imminent danger of eviction is good excuse for a promise by the vendor to pay the vendee the damages which he may sustain by the eviction.

Wheeler and Taylor, for appellants.

1. The matters set forth in plaintiff's petition, are not sufficient to support an injunction issued against an order of seizure and sale. *Code of Practice*, 739, 298, 299, 300, 301, 302 and 303. *Moreau's Digest*, vol. 1, 229. sec. 9. *Act of 1828*, 160, sec. 25; 150, sec. 2. *Code of Practice*, 610 and 612. *Civil Code*, 2205. 2. *Pothier on Obligations*, 592. *Havard vs. Stone*, 5 *Martin's Reports*, N. S. 126.

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2. The allegation in the answer, that the matters set forth in the petition are not sufficient to support an injunction issued against an order of seizure and sale, amounts to a peremptory exception founded in law, and if sustained, no judgment can be rendered on the merits. *Code of Practice*. 330, 335, 336, 345, 246. 1 *La. Rep.* 315, *Williams vs. Bethany*. *Civil Code*, 3126.

3. The defendant is only bound to warrant to the plaintiff a tract of land containing thirty arpents front on each side of bayou Terre Bonne, with such depth as to include 640 superficial acres. *Civil Code*, 2450, 2451. 7 *N. S.*, 214, 215, *Williams vs. Brent*.

4. The plaintiff has not legally proved that the defendant promised and bound himself to pay the damages he, plaintiff, sustained from the alleged change of location. *Civil Code*, 1794, 1799, 1807, 1808, 1809, 2257, 3067. *Toullier, Droit Civil Français, Liv. 3, title 3, chap. 1, nos. 6, 7, 8, 9, ps. 5, 6*. 1 *La. Rep.*, 188, *McDonough vs. Winchester*. 8 *N. S.* 457, *Cormir vs. Le Blanc*.

5. The plaintiff proved no damages, because he did not prove he had been ousted or evicted from the land, or any part of it. *Civil Code*, 2482, 2478, 3400, 2425, 3405. 9 *Martin*, 43, *Donagan's heirs vs. Martineau et al.*

6. The plaintiff did not prove that he had been disquieted in his possession, or that he had just reason to fear he will be disquieted, and, consequently, cannot withhold the payment of the price. *Civil Code*, 2535. 6 *N. S.* 216. *Latiolais vs. Richard*. *Ibid*, 340, *Milligan vs. Hargrove*. 8 *N. S.* 658, *Layoso vs. Executors of Baldwin*.

7. Parol evidence on the part of plaintiff was improperly admitted to prove an agreement on the part of defendant to pay damages, and to have the same determined by men or arbitrators, which was of the nature of transaction or compromise. *Civil Code*, 3038.

8. Parol evidence on the part of plaintiff was improperly admitted to prove that defendant sold by a plat of survey, which is not mentioned in the act of sale from defendant to plaintiff. *Civil Code*, 2256.

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9. Parol evidence on the part of the plaintiff was improperly admitted to prove a previous survey and location of the land in question. 1. *Phillips' Evidence*, 167, (170) New-York ed. 1820. 1 *Martin's Dig.* 251, 270.

10. Parol evidence on the part of the plaintiff was improperly admitted to prove the contents of a plat of survey said to be in defendant's possession, before legal steps had been taken to have said copy produced. *Code of Practice*, 140, 1 *Phillips' Evidence*, 337, 338, (389 and 390) New-York ed. 1820.

11. Damages should have been given to defendant in consequence of the dissolution of the injunction. *Acts of 1831*, 102, sec. 3.

12. The court after dissolving the injunction issued in the case, on the ground that it was illegally issued, could not render a judgment in favor of the plaintiff, and enjoin anew the order of seizure and sale for its amount. *Code of Practice*, 304. *Acts of 1828*, p. 160, sec. 25.

Preston, contra.

The facts of the case are fully stated in the opinion of the court delivered by PORTER, J.

The defendant sold, by authentic act to the plaintiff, a tract of land, and took out an order of seizure and sale, to enforce payment of part of the purchase money.

The plaintiff, by his petition, alleges this writ issued improvidently, and should be enjoined on these grounds. He was induced to make the purchase of the land from a belief that it was high and elevated. The defendant exhibited a plat of survey, by which the tract bought was so represented; he was put in possession in conformity thereby, and continued so until the.....day of.....when it was discovered that the original location was erroneous; and the same was accordingly altered by the surveyor who acted under the authority of the United States. In consequence of this alte-

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ration, he has been ousted of his possession, by which he has suffered great injury. A considerable part of what was high land in the plat of survey exhibited to him at the time of purchase, is excluded from the last made, and one hundred and fifty acres of swamp substituted in its stead. The defendant was cognizant of these facts, and promised to reimburse him the difference in value between these portions of land.

The answer avers, that the defendant sold to the plaintiff a tract of land containing thirty arpents front on each side of bayou Terre Bonne, with such depth as to include six hundred and forty superficial acres, bounded above by lands of respondent, and below by lands confirmed in the name of Joseph Gereno, with general warranty for the sum of eighteen thousand dollars; and that to receive the payment of the purchase money, a mortgage was reserved on the premises; that the sum claimed on the executive process is justly due; and that the injunction, in this case, issued contrary to law, and should be set aside.

To these special averments is joined a denial of all the other allegations in the plaintiff's petition.

The court below was of opinion that the writ of injunction had issued improvidently, and ordered it to be dissolved, but as no motion had been made on the face of the papers, to have this disposition made of the cause, and as the parties have gone to trial on the merits, the court considered the defendant bound by his promise to pay the difference in value, proceeding from the first and second location of the title. This value is fixed at two thousand four hundred and twenty dollars. From this judgment the defendant has appealed.

The first questions in the cause, are, whether the case, as exhibited by the plaintiff's petition, is such a one as authorised an injunction? or, if it be not, whether advantage can be taken of this defect, after the parties have joined issue on the merits, and have gone to trial on them.

We are inclined to the opinion, the case was one which authorised an injunction. Defendant's counsel have argued as if the matters set up here arose out of claims distinct

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from the debt attempted to be enforced, and were independent of it. If such were the case, the objections made to the damages not being liquidated, and the consequent inability to plead them in compensation, would probably be found correct. But, in the instance before us, the ground laid for the injunction is the failure of the vendee to carry into effect the agreement which created the debt sued on. If this fact be true, as alleged in the petition, and if it be, as is also there alleged, that the obligee admitted the fact and promised to make a deduction to the extent of the injury sustained, it would seem to be a fair conclusion that the whole amount originally promised was not due, and that the debt was extinguished in whole, or in part, as the case might be. *See Code of Practice, 739, art. 3.*

Several bills of exceptions, taken on the trial, present questions which we do not find necessary to examine, as we are of opinion that the promise which the defendant made is binding on him, and that there was a good consideration for the promise.

When the last survey was made, the defendant stated that he was sorry any alteration had been made, and that he would make good the damage to the plaintiff.

Subsequently, when presented with a paper, the purport of which was, that the amount of the damages should be left to arbitration, he refused to sign it, saying that he had not then time to do so; that reliance should be placed on his honor, as he had never deceived the plaintiff, and that when he returned from New-Orleans, he would leave the question as to the amount of damages to men, or arbitrators.

The objections made to the admissibility and effect of this evidence may be classed under these heads:

1. That the agreement to have the damages left to arbitration, was null and void, in consequence of its not being reduced to writing.
2. That it was a mere pollicitation, and not binding for want of acceptance.
3. That parol evidence was improperly received of the defendant's acknowledgment of a change in the location.

4. That admitting it to be properly received, and that charge established by it, there was no good consideration, as there was no actual eviction.

The first and second points may be properly considered together.

The acknowledgment to a third party by the defendant, that he owed the damages and would pay them, is, in our opinion, binding on him, and enures to the advantage of the plaintiff. In the argument, counsel has considered the case before us, as one of contract, which it was perfectly free for the defendant to give his assent to or not; but it is not one of that kind. It is a confession which there was a moral obligation in him to make, and which (as *Toullier* well states it) he could not justly refuse to make. By the former, a man consents to oblige himself. By the latter, he consents to acknowledge a pre-existing obligation, or an anterior fact. An admission of the kind binds the maker, if made in the presence of the creditor, although the party to be benefited by it, does not express his assent. And it is good if made to a third person, if supported by other facts and circumstances which render it probable, and it receive the assent of the party in whose favor it is made. In this case, there is evidence of such assent, for the plaintiff subsequently demanded of the defendant that the amount of the damages should be left to arbitration. *Toullier*, vol. 10, chap. 6, sec. 4, nos. 260, 304 and 307.

As connected with this part of the subject, it is proper to notice an objection that the proof of this promise was established by the oath of one witness alone, and that the amount attempted to be proved was above five hundred dollars. His testimony, however, has the strong corroborating circumstance, that the defendant promised to have the amount of damages settled by men, or arbitrators. The value of this fact as auxiliary proof, is not diminished, in our judgment, by the consideration that the agreement not being reduced to writing, was not valid as a *compromise*.

3. The agreement being thus established to pay the damages, we have next to consider of the third objection, that a

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If a vendor in his vendee's absence promise a third person to pay to the vendee the damages he had sustained by being ousted from the possession of the land, it is a confession and binds the vendor.

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A just cause of a promise is always understood, unless the contrary be proved.

legal cause is not shown for it. By our law, an agreement is not less valid though the cause be not expressed. *La. Code*, 1888. *Toullier*, in commenting on the corresponding article of the *Napoleon Code*, says, a just cause is always understood, *unless the contrary be proved*, and if the cause expressed is *proved* to be a bad one, then the obligation is null and void, unless the creditor shows there were other just considerations for it. It was, therefore, for the party promising in this case, after the promise was proved, to discharge himself from its effects, by showing that it was made without a just and legal cause. *Toullier*, no. 6, lib. 3, title 3, chap. 2, nos. 175, 176, 177.

4. But the debtor in this case contends, that whether it be proved the creditor to show the cause was a good one, or it devolved on him to establish it was bad, the proof makes manifest, that there was no good consideration for the acknowledgment. That consideration appears to be, that the plaintiff was put in possession by a location of the title sold to him, which the United States did not confirm, but on the contrary, gave to the lines of survey a different direction. The consequence of this alteration was, to diminish the quantity of high land which the plaintiff supposed he was acquiring, and to substitute in its stead low swamp of greatly inferior value. As there was no actual eviction, the defendant might have resisted the immediate payment and chosen to give security. The question is, whether this state of things furnished a good consideration for the promise to pay the money. We think it did. The facts of the case show a strong probability and imminent danger of eviction. The responsibility of the defendant to meet the contingency was a good consideration. It was in fact doing nothing more than changing a conditional into an absolute obligation.

Imminent danger of eviction is good cause for a promise by the vendor to pay the vendee the damages which he may sustain by the eviction.

The judgment of the District Court dissolving the injunction, must be reversed. Its estimate of the damages have been complained of by the plaintiff, but we think it correct.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; and it is further ordered and decreed, that the injunction granted in this case

be made perpetual for the sum of two thousand four hundred and twenty dollars; that it be dissolved for the remainder of the sum for which the order of seizure was taken out. The appellee paying costs in this court, the appellant those of the court of the first instance.

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REBOUL'S HEIRS vs. BEHRENS ET ALS.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

The creditor who has sold property, seized under execution, on a twelve months bond, cannot resort to the original judgment, until he has exhausted the property of the principal and surety.

The affidavit for an injunction, must be such as to render the party liable to a conviction for perjury, if the facts sworn to are not true.

It is insufficient for a party praying an injunction, to swear "That the material facts and allegations are true and correct, to the best of his knowledge."

This action was brought to enjoin the defendants from further proceedings, in a suit against the plaintiffs, in which judgment had been obtained against the latter, a writ of *feri facias* issued, and their property seized.

Louis A. Reboul, the ancestor of the plaintiffs, had purchased a tract of land, and had given his mortgage upon it for the payment of the purchase money. After his death, a suit was instituted by his vendor against his widow and heirs, for the balance then due. Judgment having been rendered in favor of the vendor, a writ of *feri facias* issued, the land was seized and sold to Alexander Reboul, for a sum sufficient to pay the debt, interest and costs, for which, with

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the plaintiffs consent, a twelve months bond was given, with the widow of Louis A. Reboul, as surety.

An alias writ has since issued, and a tract of land belonging to the plaintiffs in common, has been seized. To stay proceedings against this property, an injunction was obtained.

On motion of the defendants, the injunction was dissolved and the suit dismissed. The plaintiffs appealed.

Labauve, for appellants.

1. The judge erred in sustaining the exceptions to the petition and affidavit.

2. The oath for injunction, needs not, and cannot be positive, it is only to give *prima facie* evidence of the facts, in order to authorise the judge to grant the provisional order until he can hear the parties.

3. Plaintiffs in injunctions, are sometimes bound to aver facts which they cannot swear to positively, in some cases they must aver and swear to a negative. *C. P. art. 301.*

4. Admitting that the exceptions were available, the judge erred in dissolving the injunction, it appearing from the circumstances of the case, that by an immediate application, a new one would issue again. *Martin's Rep. 3 N. S. 480, 4 ibid. 499, 2 La. Rep. 63.*

5. It is clear, that the plaintiffs property was illegally seized on the *feri facias* issued against the purchaser and surety on the twelve months bond, before the creditor can resort to his original judgment, he must show that the parties to the bond have no more property, it is a condition precedent. *Martin's Rep. 7 N. S. p. 205.*

Lawrence, for appellees.

MARTIN, J. delivered the opinion of the court.

The plaintiffs and appellants complain of the dissolution of the injunction and the dismissal of the suit, on the ground of the insufficiency of the affidavit.

The affiant swore, "that the material facts and allegations in the said petition, are true and correct, to the best of his knowledge."

His counsel has contended, that the oath for an injunction need not, and cannot be positive, its only object being to give *prima facie* evidence of the facts, in order to obtain a provisional order until the parties be heard. The applicant is sometimes bound to aver facts, which he cannot positively swear to. The negative must sometimes be sworn to; admitting the exception was available, the injunction was erroneously dissolved, as it appeared from the circumstances of the case, that on a new application another cannot immediately issue. 3 *Martin's N. S.* 480, 4th ed. 499, 2 *La. Rep.* 63.

The plaintiffs' property was illegally seized on a *feri facias* against the purchaser and his surety on the twelve months bond; the creditor before he resorts to his original judgment, being bound to show that he has exhausted the property of the principal and sureties on the bond. 7 *Martin's N. S.* 205.

The counsel of the appellees has contended the oath is insufficient, nothing being positive. *Code of Practice* 304, 1 *Martin's N. S.* 329. If the affidavit be set aside, nothing shows the verity of any allegation as the basis of a second injunction. The case shows facts on which the remedy is not by injunction, but opposition to the sale of the property seized. *Code of Practice*, 396 and 97.

In our opinion, the affidavit for an injunction, ought to be such as to submit the party to the penalties of perjury, if the facts sworn to appear to be otherwise. He should swear to avoid these penalties, that the facts stated, as within his knowledge, are true, and those not stated as within his knowledge he believes to be true. This is the case in the Courts of Chancery, or Equity, in the Atlantic states. Whether the loose mode of swearing to the best of one's best knowledge and belief, be a sufficient abbreviation of the proper formula, we ought not to say, till a case before us require our decision. It appears to us, that a party who swears to the best of his knowledge, may easily avoid a conviction of perjury, by showing he had so imperfect a knowledge of the facts

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The creditor who has sold property, seized under execution, on a twelve months bond, cannot resort to the original judgment, until he has exhausted the property of the principal and surety.

The affidavit for an injunction, must be such as to render the party liable to a conviction for perjury, if the facts sworn to are not true.

It is insufficient for a party praying an injunction, to swear "That the material facts and allegations are true and correct, to the best of his knowledge."

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sworn to, that he might be very easily mistaken if he swore to what one person told him he heard another person assert. The affidavit is in our opinion insufficient.

We are unable to say how another injunction could have issued regularly, after the dissolution of the first, on account of the sufficiency of the affidavit, until a new and sufficient one was made, which does not appear to have been the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

DEBLANC vs. WEBB ET AL.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

The rules relative to answers to interrogatories on facts and articles, are more rigid than those which govern ordinary answers.

A garnishee not answering when interrogated on facts and articles cannot avoid the legal effect of his negligence.

Cramford, for appellants.

1. The answers were not categorical; all the questions were not answered. *Code of Practice*, arts. 246, 247, 248 and 349.

2. They could not be amended, as they contained an admission of funds in the garnishees' hands, and a judicial confession cannot be retracted. *New Civil Code*, art. 2270.

3. The cotton, or its proceeds, was still liable to be attached by the creditors of Webb & Co.

4. It had never ceased to be his property. *Code of Practice, Eastern Dist. February, 1832.*
arts. 241, 246.

Conrad, for appellees.

The decision is correct, the appellants not having answered the interrogatories propounded to them as garnishees, in the manner required by law.

The facts are fully stated in the opinion of the court pronounced by MATHEWS, J.

This suit was commenced by attachment; and Willcox & Fearn were cited as garnishees, and interrogatories propounded to them to ascertain whether they had in their possession any property or funds belonging to the defendant, or were in any manner indebted to him at the time the interrogatories were served on them.

These interrogatories were three in number. The two first had reference to property and funds in the hands of the garnishees; and the third is an inquiry, whether they were indebted to the defendant. They did not answer the questions separately, but in a general answer acknowledged that they had cotton and money in their hands belonging to the defendant, to the amount of one thousand four hundred and eighteen dollars and ninety cents; with instructions from the owner to apply the same to the payment of the respective debts of De Blanc & Lavillebeuvre, of nine hundred and seven dollars and eighty-nine cents, with interest; of Rogers & Slocumb, of three hundred and seventy dollars and seventy-eight cents, with interest; of William A. Gasquet & Co., of nine hundred and forty-eight dollars and seventy-nine cents, with interest; and that, agreeably to their instructions, they promised to pay to each of these creditors a proportionable part of said sum of one thousand four hundred and eighteen dollars and seventy-nine cents, according to the amount of their debts, &c.

After this answer was filed, the creditors, to whom the garnishees had made the communication and promises, as

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therein stated, intervened and prayed that the attachment might be dissolved, and for a judgment in their favor, &c.

The defendant, in the attachment, appeared and answered by declaring that the instructions, as stated in the answer of the garnishees, had been given to them. The plaintiff answered the petitions of the intervening parties by a general denial.

On these pleadings, without any further evidence being adduced, (for none appears on the record,) the plaintiff moved for judgment against the garnishees, personally, on the ground that they had not fully answered to the interrogatories, and that their omission to do so, amounted to an admission of funds, which made them liable for the plaintiff's demand; whereupon, the counsel for the defendant intervenes, and garnishees offered to have said answer made more full and explicit, by stating, on oath, that they were not indebted to the defendant, which was refused by the court below, and bill of exceptions taken, &c.

The court then proceeded to give judgment against the defendant and in favor of the plaintiff for the whole amount by him claimed, and ordered it to be paid by the garnishees; from which they and the intervenors appealed.

The record does not contain any statement of facts, nor have errors been assigned as being apparent on its face; the case is, therefore, placed before this court solely on the bill of exceptions; and, consequently, we have only to determine whether the judge *a quo* erred in his opinion on this part of the cause.

A case, in which a garnishee claimed the right to amend his answers to interrogatories, (it is believed) never was agitated before the courts of this state, previous to the present. The practice of allowing amendments to petitions and answers made in the ordinary manner, when such amendments evidently tend to the furtherance of justice, has always been adopted and liberally acted on, under the provisions of our jurisprudence. But, answers required to be made under oath, to interrogatories *on facts and articles*, ought not to be considered as coming within the scope of these provisions.

The rules relating to such answers appear to be different from those which govern in ordinary answers to actions; they are, of necessity, more rigid and unbending in order to hasten the administration of justice. Sufficient time is always allowed to the defendant to examine the questions, and weigh well his responses before committing them to writing. The object of such interrogatories is to elicit truth, and ample opportunity is afforded to the person interrogated, to answer clearly, fully and unequivocally. If he does not properly avail himself of such opportunity, it is his own fault. A practice once admitted of allowing suitors to amend their affidavits *ad libitum*, would probably induce inconvenience and delays, and might have a tendency, in many instances, to lead to perjury. And although we do not apprehend the slightest danger of the latter in the present case, still, rules of practice must be acted on in relation to cases in general. A strict adherence to the articles of the *Code of Practice*, which relate to the answers of garnishees, may, in the instance now before the court, operate an injustice to the appellants; but private loss or injury must often be tolerated in support of public good, and individual inconvenience yield in support of sound general principles.

The appellee relies mainly for an affirmation of the judgment rendered against the garnishees, on the *articles* of the *Code of Practice*, 246, 247, 262, 263, 348 and 349; and the art. 2270 of the *La. Code*. The two first of these articles relate to the right of a plaintiff, on attachment, to make third persons parties as garnishees, and to interrogate them *on facts and articles*. The next two relate to the consequence of refusal or neglect to answer by garnishees. The two last have reference to interrogatories allowed to be put either by plaintiffs or defendants, and the consequences of neglect or refusal to answer. The article cited from the *Louisiana Code*, contains provisions in relation to judicial confessions.

The articles 262 and 263, are those which bear more immediately on the question before the court. The first provides, that "a garnishee who has been cited in a suit must put in his answer within the usual delay, &c.; and if interrogated

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The rules relative to answers to interrogatories on facts and articles, are more rigid than those which govern ordinary answers.

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on facts and articles, he must answer, under oath, clearly and categorically, each question put to him touching such matter." The second provides, that "if the garnishee to whom interrogatories have been put, refuse or neglect to answer the same under oath, in the delay of the law, such refusal or neglect shall be considered as a confession of his having in his hands property belonging to the debtor, sufficient to satisfy the claim made against such debtor, and judgment shall be rendered against him, &c.

In the present case, the answer of the garnishees appears to be fully responsive to the two first interrogatories put; and although they do not appear to have been answered separately, the answer, as to them, may be considered categorical, being direct, absolute and positive. This answer admits funds belonging to the debtor in their hands, but alleges, that at his instance, they had promised to pay them over *pro rata* to several of his creditors, before service or notice of the interrogatories; a circumstance which would probably have released these funds from the plaintiff's attachment.

But no answer whatever is made to the third interrogatory, by which the garnishees were questioned as to their indebtedness to the defendant. The counsel for the appellants, however, contends that the answer to the two first imply a negative response to the third. This we think by no means a necessary or legal *sequitur*. That they had funds in their hands is shown by their answer; but they might at the same time have been indebted to the principal defendant in a farther sum, and having declared that these funds had received a distinction which would probably prevent the attachment from holding them, they ought to have answered the third interrogatory categorically, stating personally whether they were or were not indebted to the defendant. By neglecting to do this, they have subjected themselves to have a judgment rendered against them for the amount claimed by the plaintiff according to the spirit of the art. 263 of the Code of Practice.

To permit the garnishees now to avoid the legal effect of their negligence in not answering this interrogatory, would,

A garnishee not answering when interrogated on facts and articles, cannot avoid the legal effect of his negligence.

in our opinion, violate express law on the subject, and might, in other cases, lead to prevarications and unsuccessful delays in the administration of justice.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

BORIE, F. W. C. VS. BORIE, F. W. C. ET ALS.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

The wife cannot, as owner, prevent the sale of a lot of land seized under an execution in favor of the creditors of her husband, to whom by public act the sale was made, by alleging that the purchase money belonged to her.

Although the words of a law are clear and free from ambiguity, if the meaning of the whole context be doubtful, the Code permits a departure from its letter, and a resort to its spirit.

A privity is contemplated by the law between the party enjoining and the judgment enjoined.

If a party through error or mistake, claim property which has been seized under execution, the penalty extends only to the property claimed.

This suit was brought by the wife of Augustin Borie, to obtain a separation of property; to recover of him the sum of seven thousand one hundred and seventy-two dollars, received by him in her right; to obtain a decree, giving her a legal mortgage on his estate for that amount; to enjoin the sheriff of the parish, and the plaintiffs in another suit, from proceeding further in a seizure of a part of her property made against her husband, the defendant; and to stay all proceed-

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On motion of the opposing creditors of the husband, the court dissolved the injunction prayed for in the plaintiff's petition, and condemned the plaintiff and her surety *in solido*, for the payment of one hundred dollars, special damages, with costs of suit.

A motion for a new trial having been overruled, the plaintiff appealed.

Labauve, for appellants.

1. The motion to dissolve the injunction on the face of the papers, was wrongfully sustained.

2. Although the act from Belly to Borie, purports to be a sale, nevertheless the plaintiff who was no party to that act, is entitled by law to establish even by parol evidence, the nature of the transaction, and that it contained in reality, in her favor, a *dation in paiement*. 7 *N. S.* p. 199, 11 *Martin* 630.

3. Again, the motion to dissolve on plaintiff's own showing, gave for granted all the facts averred in the petition. 8 *N. S.* p. 395.

4. Even admitting that parol evidence could not be received, to show a *dation in paiement*, it is not known yet, by what kind of proof plaintiff intended to satisfy the court of that fact; she may have the best kind of written evidence; she had not the opportunity to offer any, the defendants forced her to trial on the face of her papers, allowing her the benefit of her allegations, as stated in the petition.

5. Should it be true, in fact, that Belly, instead of paying to Borie the thirty-two hundred dollars coming to his wife, gave, and Borie accepted in payment, the land; it is clear, that the property could not form a part of the community, in the meaning of the law. *Old Civil Code*, p. 336, art. 64, (similar to *New Civil Code*) 5 *N. S.* 255, 8 *N. S.* 192, 1 *La. Rep.* 520. In renouncing the community, the wife retakes her *biens propres*. *Civil Code*, 2404.

6. The judge erred in allowing special damages to the defendants, against the plaintiff and her surety; no law authorised such a decree in the case; the surety was not in court nor heard; the court could not sentence her, neither for damages nor for cost; if the defendants suffered damages, admitting that the injunction was wrongfully sued out, they could not be recovered but by a distinct and separate action on the bond, even then it is clear that attorney's fees would not be considered as damages, and the allowance of them here is erroneous.

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ET ALB.

PORTER, J. delivered the opinion of the court.

This case presents a contest between the wife of an alleged insolvent, and some of his creditors, in relation to a tract of land which they have seized under an execution issued against the husband, as belonging to him, but which the petitioner alleges to be her property.

There is a bill of sale by authentic act, from the father of the petitioner to the husband, but she alleges that the consideration in point of fact, was not that expressed in the deed, but was in truth the sum of thirty-two hundred dollars, of which her father had made a donation to her.

The defendants moved to dissolve the injunction, for errors apparent on the face of the papers. The court sustained the motion, and the petitioner appealed.

The court understands that the only question now before it is, whether the wife as *owner* of the property seized may prevent its sale. What may be her rights ultimately on the property as a privileged or mortgaged creditor, or as exercising the subsidiary right, which the laws of Spain, in force at the time this transaction took place, afforded her in cases of this kind, is not considered before us.

The wife cannot as owner prevent the sale of a lot of land, seized under an execution in favor of the creditors of her husband, to whom by public act the sale was made, by alleging that the purchase money belonged to her.

We think the court below did not err. It is true, that by the Spanish jurisprudence and laws, property purchased by the husband, with the money of his wife, becomes hers. Still, if the acquisition was made in his name, and without her intervention, as is alleged was the case here, her right was

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only subsidiary, and could not be exercised but in case of insolvency and defect of other property. See 8 N. S. 192. *Febrero p. 2, lib. 1, chap. 4, sec. 1, no. 7.* The court below refused to assess damages against the plaintiff, under the act of 1831, but gave judgment against her and her surety for one hundred dollars, as special damages.

This decree is complained of by both parties. The refusal to grant the damages prescribed by the act just referred to, appears to have been made in consequence of the decision of this court in the case of *Ricard's heirs vs. Hiriart*, not yet reported. We have been requested to review that decision, and a very elaborate argument has been addressed to us, to prove its incorrectness. The substance of the objections offered is, that the law makes no difference between the case of a third party suing out an injunction against the sale of a particular piece of property, and the defendant in execution who arrests the progress of the writ entirely. That where the law does not distinguish we should not. And finally, that the case of third parties obtaining injunction, is within the mischiefs intended to be repressed, as well as within the express letter of the law.

If this reasoning be correct, we were certainly in error, and it would be our duty to retrace our steps, and get right as soon as possible. After a very attentive consideration of the subject, we feel, however, constrained to retain our first impressions. It is true, the statute does not in express terms, confine the penalty to the defendant in execution who enjoins. It speaks generally of *the trial of injunctions*, and says that on this trial the surety on the bond shall be considered as a party plaintiff in the suit, and it directs that the court in the same judgment shall condemn the plaintiff and surety jointly and severally, to pay to the defendant interest at the rate of ten per cent. per annum, on the amount of the judgment, and not more than twenty per cent. as damages, unless damages to a greater amount be proved.

In the construction of statutes we are directed by our Code, when the law is clear and free from *all* ambiguity, not to depart from its letter, under the *pretext* of pursuing its spirit.

This is no doubt a very proper limitation on the power of courts. But we apprehend it was not contemplated by this enactment, that because each word had a distinct and clear signification, that we are not to seek in the whole context for the meaning of the law maker. This surely cannot be considered as a *pretext*, that is, a *false allegation*, of pursuing its spirit. Then how can a law be said to be clear from *all* ambiguity, when the perusal of it leads the mind of those who are compelled to interpret it, to a conclusion that another class of cases, than that which it is required to apply it to, were provided for. Such is our conclusion in the instance before us. We think it evident the law contemplates a privity to exist between the party enjoining and the judgment enjoined. Else why direct damages at a certain rate to be agreed on the amount of the judgment. Can any one believe it was the intention of the legislature, that where the seizure was made under a judgment to any amount, and there have been some rendered in the court as high as fifty thousand dollars, that a third party who believed he had a right to any, the smallest portion of the property seized, could not assert that right without exposing himself to a penalty in case of mistake or error, to ten, or perhaps fifty times the amount in dispute? We do not believe any such thing was intended. The penalty being given, and the interest directed to be calculated on the *amount of the judgment*, satisfies us that it was intended in cases where the execution of the *judgment* was enjoined. In the greater number of instances, (and it is for these, legislation is presumed to be made) the injunction by a third party, leaves the judgment and execution in full activity on all property but that which he claims, so that the case is not within the mischiefs intended to be repressed. It would be a strange conclusion indeed to reach, that in case, where, notwithstanding the property of which the sale was enjoined, did not amount to perhaps one twentieth part of the judgment, and the defendant in execution had other property sufficient to satisfy it, no individual can contest the privilege of the creditor to seize and sell any part of the property of the debtor, except under the penalty

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Although the words of a law are clear and free from ambiguity, if the meaning of the whole context be doubtful, the Code permits a departure from its letter, and a resort to its spirit.

A privity is contemplated by the law, between the party enjoining and the judgment enjoined.

If a party, through error or mistake, claim property which has been seized under execution, the penalty extends only to the property claimed.

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far beyond the value of the thing in dispute! Yet that is what is contended for; the law is said to be clear from all ambiguity, and it applies to all cases of injunctions. The proposition indeed amounts to this, that by our law, every man who is a creditor, is invested with privileges which are given to no other citizen, and that no one shall contest his right to seize any property under execution, except at the risk of paying a penalty which he would not be obliged to pay in asserting his claim against any one else; a penalty too, which in many instances would bear no proportion to the value of the property, or the injury inflicted. Whenever the legislature of Louisiana tell us in express terms, that it is their intention to make a privileged order of creditors, we shall believe it, not before. And we fully assent to the opinion of the Supreme Court of the United States, that "where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with inevitable clearness, to induce a court of justice to suppose a design to effect such objects." 2 *Cranch* 390.

We do not think it necessary to examine, whether in a case where collusion was proved between the plaintiff in injunction, and the defendant in execution, the penalty might not be incurred, because the collusion is not proved in this instance to our satisfaction.

Believing this case not to come within the act of 1831, we think the court below erred in condemning the plaintiff and her surety, to pay one hundred dollars damages. The defendants' remedy is on the bond.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and proceeding to give such judgment here, as in our opinion ought to have been given below, it is decreed and ordered, that the injunction granted in this against the sale of the property mentioned in the petition be dissolved, the plaintiff paying the cost below; the defendants those of appeal.

BRUGIER vs. MOUSSIER'S ADM'R.

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APPEAL FROM THE COURT OF PROBATES OF THE PARISH OF JEFFERSON.

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vs.
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ADM'R.

Where a party was employed in the month of October, and again in the month of December, the court will infer that there was but one contract.

This action was brought to recover, as a privileged debt, the sum of seven hundred and eighty-four dollars and eighteen cents. This sum appears to be due the plaintiff for work done upon a plantation at different times. The object of the suit was to obtain a privilege on the proceeds of the sale of the plantation, which the administrator of the deceased debtor had refused to grant. The value of the work exceeded five hundred dollars; no contract was ever registered. The court below decided there was but one contract, and consequently refused the privilege asked. The plaintiff appealed.

D. Seghers, for appellant.

1. Such facts as are not denied by the answer, are to be considered as admitted. The plaintiff is not bound to administer any proof of his allegations which are not denied by the answer. 4 *Martin's Reports*, N. S. 615, *Akin et al vs. Bedford et al.*

2. This case is to be governed by art. 3239 of the *La. Code*.

Appellee, in propria persona.

1. The answer does not admit any thing, except that the plaintiff is an ordinary creditor of the estate of J. B. Moussier, for the sum of six hundred dollars, therefore plaintiff was bound to make out his case.

2. If, as contended by defendant, there was but one contract exceeding five hundred dollars, the plaintiff has no privilege, because the contract was not registered as required by law. *Civil Code*, 2746, 3239.

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3. If there were two contracts, the privileges resulting therefrom, are prescribed. *Civil Code, 2747.*

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PORTER, J. delivered the opinion of the court.

The petition states, that in the month of October, 1830, the plaintiff was employed by the deceased to do certain work on his plantation, and that the value of this work is four hundred and seventy-six dollars and ninety-six cents, of which there has only been paid the sum of one hundred and eighty dollars, leaving a balance of two hundred and ninety-six dollars and ninety-six cents.

It further states, that on the first of December, of the same year, he was again employed to work on the plantation of the deceased, and that his labor was worth four hundred and eighty-seven dollars and twenty-two cents.

The answer acknowledges, that the sum of six hundred dollars was due, but denied the claim set up in the petition, that the debt should be paid by privilege and preference.

The court gave judgment for the amount admitted by the answer, but refused the privilege. The plaintiff appealed.

The 2746th article of the *La. Code*, provides, that no agreement or undertaking for work, exceeding five hundred dollars, which has not been reduced to writing, and registered, shall confer a privilege.

The plaintiff contends, that the amount due exceeds five hundred dollars; and there was no registry, yet the debt should be considered privileged, and decreed to be paid as such, because it arose from two agreements, each of which was below the sum of five hundred dollars.

In support of this proposition, he relies on the allegations in the petition; that he was *employed* in the month of October, and again *employed* in the month of December, to work on the plantation of the deceased; and that the allegations being uncontradicted by the answer, must be taken as true.

Testimony was taken, by consent of parties, which establishes, that the plaintiff, after commencing work on the plantation, and continuing at it for some time, was compelled,

for want of materials, to stop, and that he afterwards returned and worked there again.

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The judge below considered, that although there were two accounts presented, there was, in truth, but one contract, and rejected the claim of privilege.

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There is no allegation in the petition, that there were two distinct agreements, or contracts. The plaintiff might well be employed on the plantation in the month of October, and again in the month of December, in virtue of one contract. When such consequences are drawn from an admission, as are attempted here, the allegation should be clear and distinct in its meaning. The word, *employ*, may mean either busy, or occupied at work, or it may mean commissioned or instructed with the management of an affair. If taken in the latter sense, it might, perhaps, justify the conclusion, it was used in the petition to express two distinct commissions, or engagements; but it is clear the plaintiff himself did not so intend to use it. For he alleges, that on the first of October, and the following days, he was employed to erect buildings, which clearly means, that he was occupied and at work on the plantation during these times; unless he intended to say, that he made a new agreement each day, which is not contended for. The admission, therefore, in the answer, that the intestate owed six hundred dollars, cannot be taken as a confession there were two agreements; and the parol evidence, that work was discontinued for want of materials, joined to the extreme improbability that two distinct contracts were made on a sugar plantation, at that season of the year, for work, of which the necessity was as obvious before October, as in December, satisfy us the judge did not err; and it is, therefore, ordered and decreed, that the judgment of the Court of Probates be affirmed, with costs.

Where a party was employed in the month of October, and again in the month of December, the court will infer that there was but one contract.

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DESLONDE, F. M. C. vs. LE BRERET.

DESLONDE,
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vs.
LE BRERET.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
SECOND PRESIDING.

The natural father is not a competent witness for his natural child.

A bill of sale, specifying the price paid for a slave, is proper evidence as to his value, though not conclusive.

Hiriart and Davis, for appellant.

Nichols, for appellee.

The court *a quo*, did not err in rejecting the testimony of applicant's father, he being an incompetent witness, both from interest and relationship. *La. Code*, 2260.

The facts are stated in the opinion of the court, delivered by PORTER, J.

The plaintiff sues the defendant, to recover from him the value of a slave, which he is alleged to have killed.

The answer denies that the defendant is indebted in manner and form as alleged, or in any other; and further, that if the slave came to his death through the agency of defendant, he was justifiable in the eye of the law, as the negro was in the habit of stealing and carrying away the defendant's property in the night.

On the trial, the plaintiff offered his natural father as a witness; he was objected to, and the court refused to admit him to testify. To the opinion of the judge thus rejecting the witness, a bill of exceptions was taken.

The natural father is not a competent witness for his natural child.

The 2260th article of the Louisiana Code, supports the opinion of the judge, and the reason on which the exclusion is pronounced by that article, seems to us to apply as well to natural, as to legitimate children. *La. Code* 916.

Another bill of exceptions was taken to the judge refusing the plaintiff permission to give in evidence a bill of sale by which he had acquired the property. We learn by the bill of exceptions, that the evidence was offered as well to prove title in the slave, as to prove his value.

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It was objected to because the title was not put at issue by the pleadings, and because the same was now more formally admitted on record, and second, that the act did not show the value of the slave at the time of his death, or at any other time.

We are of opinion the court erred. The price which the owner of a slave has paid for him, is very proper evidence to be laid before a jury of his value, though it is by no means conclusive. The fact appearing on the bill of sale, in the present instance, namely, that no particular value was affixed to the slave in question, but that a certain sum was given for him and several others, did not authorise the court to reject it, because the plaintiff might have shown from other testimony, that the other slaves were of equal value to the negro killed, and that consequently the sum paid for him, was the proportion to one which the whole number bore to the price given for all. It is no legal objection to evidence, that it does not *per se* prove the whole case, or make out a distinct fact completely. It is sufficient if it aids in arriving correctly at either.

A bill of sale, specifying the price paid for a slave, is proper evidence as to his value, though not conclusive.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, and it is further ordered, that this cause be remanded for a new trial, with directions to the court, not to reject the bill of sale mentioned in the bill of exceptions, and it is further ordered, that the appellee pay the costs of this appeal.

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WALLACE.

HURST vs. WALLACE.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where slaves are put on board of a steamboat by a person who assumes to be their owner, and who accompanies them to their place of destination, no responsibility attaches to the captain.

Whether the captain would be liable, where the slaves are put on board, but not accompanied by the person assuming the ownership, without proof of criminality, or gross negligence.—*Quere?*

Buchanan, for appellants.

1. The evidence for the defendant, to which exception was taken, was improperly admitted.

2. The allegations of petition as regards the abduction of slaves, and the damages claimed therefor, are made out by proof.

3. The defendant, as master of the steamboat, on board of which the slaves were carried away, is, by law, liable for the damages occasioned by their abduction, in consequence of not having complied with the requisitions of an act of 1816, entitled "An act to take the most effectual measures in order to prevent the transportation or carrying away of slaves out of this state, against the will of their owners, and for other purposes."

Worthington, for appellee.

The judgment conforms to the justice of the case, and is consistent with the evidence.

The facts are stated in the opinion of the court, delivered by MATHEWS, J.

In this case, the plaintiff claims damages, which he alleges that he suffered by the misconduct of the defendant, (who

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was master of the steamboat Hercules,) by receiving on board said boat and carrying to Louisville, in Kentucky, two slaves, the property of the petitioner.

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Reliance for a recovery of the damages claimed, is placed solely on the provisions of an act of the legislature, passed in 1816, to be found in the printed laws of that year, at page eight. The third and fourth sections of this act, are those cited by the plaintiff in support of his claim. The first of these sections prohibits masters or commanders of ships, and other vessels and water crafts, from carrying out of this state any free persons of color, without filing evidence in the office of the mayor of New-Orleans, or in that of some parish judge, as the case may require, of the freedom of the person about to be transported. And in cases where slaves are to be carried out of the state, written permissions of the owners are required to be filed in like manner. The fourth section fixes the amount of penalty for a violation of the act, and establishes the right of persons injured to recover damages, &c.

The court below rendered judgment in favor of the defendant, from which the plaintiff appealed.

The evidence of the case shows, that the slaves in question were put on board the boat by a person who assumed to be their owner, and who went with them in the boat. No proof seems to have been adduced to authorise a belief, that the master acted in any manner criminally, or was grossly negligent in his conduct in receiving the slaves and pretended owner on board his boat, and carrying them to their place of destination. Unless the statute must be so construed as to prohibit commanders of vessels from carrying slaves and their owners, together, out of the state, without pursuing the formalities required by it, in relation to free persons of color, or slaves, who may be permitted to be taken away. We are of opinion, that neither the letter nor the spirit of the law imposes such duty on a master of a vessel, when the owner puts his slaves on board and goes with them. Perhaps, not even in a case when they were put on board without being accompanied by a person assuming a right of ownership, where no proof was made of criminality, or gross negli-

Where slaves are put on board of a steamboat by a person who assumes to be their owner, and who accompanies them to their place of destination, no responsibility attaches to the captain.

Whether the captain would be liable where the slaves were put on board, but not accompanied by the person assuming the ownership, without proof of criminality or gross negligence. *Quere?*

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gence, on the part of the commander. The evidence shows, in the present case, that the plaintiff has received injury and suffered loss; but the loss, or damage, was occasioned solely by the criminal conduct of the pretended owner. To give the construction to the act contended for by the counsel for the appellant, would be to make an innocent man responsible for the offence committed by the guilty, contrary to all sound principles of morality and law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

STERLIN'S EXECUTOR vs. GROS.

**APPEAL FROM THE COURT OF PROBATES OF THE CITY AND PARISH OF
NEW-ORLEANS.**

A nuncupative testament by public act, executed in the presence of three witnesses, who do not reside within the parish, is null and void.

Sales of property made under a will, which is null and void, cannot be set aside by the court, unless third persons who have obtained an interest in the property, are made parties.

An estate is liable for the costs incurred by an executor, under a will which is null and void, in endeavoring to sustain its validity.

If a will be declared null and void, the executor under it, will be decreed to render to the court an account of his administration, and to bring into court all the moneys and credits of the estate in his hands.

This action was brought to obtain possession of the estate of Philippe Sterlin, deceased. The plaintiff produced a notarial copy of the will, by which the deceased acknowledged him to be his only child, and bequeathed to him three-fourths of the property of which the testator should die possessed, and

constituted him his legatee, by universal title. The plaintiff averred the nullity of another instrument, purporting to be a will, executed by the deceased, on the grounds of want of capacity in the deceased, at the time of making it, misunderstanding of its contents, and for not being legally witnessed.

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The defendant and executor, under the will alleged to be void, appeared and excepted, that the plaintiff was not entitled to be put in possession of the estate of the deceased. He answered, that the will, under which he was executor, was valid; that the same had been duly homologated and registered in court, and the usual formalities had been complied with on his part. He averred, that part of the property of the succession had been sold by the register of wills, under an order of the court.

An injunction obtained by the plaintiff, was dissolved on the defendant giving bond and security, conformably to the 307th article of the *Code of Practice*.

The court rescinded the order of registry and execution of the will, under which the defendant was appointed testamentary executor; and that will avoided, and all proceedings under it, which had taken place. The defendant appealed.

D. & J. Seghers, for appellant.

1. The executor is bound to maintain the last will of his testator by all lawful means. He would be liable in damages, should he not do it. He cannot, therefore, be decreed to pay ten per centum damages to the plaintiff and appellee, for the sole fact of having appealed from the judgment of the inferior tribunal.

2. The court below was right in directing the estate of Sterlin to be placed in the hands of the register of wills, and not in the possession of the alleged natural son of the deceased, even on his offering due security; because, should the last will of the deceased be annulled, there exists another will, which, if admitted, is then to be executed, and which

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appoints testamentary executors, in whose hands alone the estate must be placed.

3. The court below was right in directing the costs of the suit to be paid by the estate. The executor is bound to maintain the last will of his testator, and should not suffer damages for doing his duty.

4. The injunction obtained by the plaintiff and appellee, was correctly dissolved, in pursuance of article 307 of the *Code of Practice*, and 2601 of the *Civil Code*; and this court cannot, in this case, inquire into the validity of a sale of real property situated in the parish of Jefferson, but sold at New-Orleans by the register of wills.

5. Admitting, for argument's sake, that the last will of the deceased be null and void, even in that case the court below appears to us to have erred in deciding that all the proceedings under the will are thereby annulled. It does not necessarily follow, that the inventories and sales, made under the direction of the Probate Court, must fall, because the last will of the deceased is found to be defective. Such a principle would throw society into confusion, and destroy faith due to judicial proceedings. *Duranton*, vol. 3, page 471, no. 479.

6. The plaintiff has no right to sue, for the only legal evidence on record of his being the natural son of the deceased, is contained in the last will under which he claims. Now this will is null and void on its very inspection, as not being with the formalities required by law. It is not entitled to any credit whatever, and of course the allegations therein contained must not be attended to, and are of no effect.

7. The court below appears to us to have erred in admitting testimony to contradict the last will of the deceased. (It is here to be observed, that this testimony was taken down in court, subject to all legal exceptions. This was done in order not to burthen the record with bills of exceptions.) We say, that no such testimony ought to have been admitted. No defect was perceived in the will on its inspection. The will, therefore, according to the *Civil Code*, art. 1640, makes full proof by itself, that all the formalities have been complied with,

and that all the facts and allegations therein contained are true, unless the will be alleged to be false; (*argué de faux*) which was not done in this case. 13 *Merlin Rep. Jurisp.* 405, Paris ed. 1815, *sur l'opinion du president Favre.* 5 *Martin's Rep. Langlish vs. Schons.*

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8. Should the court, contrary to our expectations, be of opinion, that testimony has been rightly introduced to prove the residences of the witnesses, then we would say that the spirit of the law has been complied with; for the witnesses to the will were the intimate friends and nearest neighbors of the deceased; and secondly, that there is no law so strict as not to admit an exception. We here find one pointed out to us by the Roman law, *Barbarus Philippus*, whereby it is said that a slave having acted as proconsul, in a province, all his acts, as such, were approved by the prince, and admitted to be good and valid, on account of his having been believed to be free by all those therein concerned. See *Merlin*, who says, on this point, that this decision is to be followed in all similar cases where people are laboring under a false impression. 13 *Répert, Jurisp.* 389, sec. 2, no. 3, Paris ed. 1815. *Verbo Témoin Instrumentaire.*

9. The plaintiff alleges in his petition, that on the 14th, the testator was not in a situation to make a will; the contrary is proved by the physicians, Senac, Bozeman, and all the other witnesses; on the 15th, it is true, that the testator had lost his senses.

10. The plaintiff alleges, that the wishes of the testator were not complied with. This fact is contradicted by the testimony of Pollock, Mouchor, and even by Bozeman, who says, that the notary read the will very slowly, stopping at the close of every sentence.

Preston, for appellee.

1. The will under which Celestin Gros claims, is null, because attested by witnesses not residing in the parish where it was made.

2. Because the dispositions of the testator were not understood by the notary.

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3. Because the wishes of the testator were not complied with.
4. Because he was not in a situation to make a will.
5. The will, under which the appellant claims, is made perfectly in conformity to law.

PORTER, J. delivered the opinion of the court.

The defendant is named executor in an instrument which he affirms to be the last will and testament of one Phillippe Sterlin, deceased. The plaintiff who is natural son of the deceased, and who alleges that his father left no legitimate ascendants or descendants, or brothers or sisters, sues to have this will declared null and void, and to obtain possession of the property of which the deceased died possessed.

The defendant contests the *quality* of the petitioner, but we think the evidence clearly establishes it. Admitting the objections made to the previous will, in which the plaintiff expressly recognized as his natural son by the deceased, still it is good as a declaration before a notary and witnesses.

The instrument which the defendant presents as the last will and testament of the deceased, cannot be considered such, because the witnesses to it do not reside, nor did reside at the time it was made in the same parish with the testator, and they are not in sufficient number to meet the requisitions of the law, considering them to be non-residents.

By the 1571st article of the Louisiana Code, nuncupative testaments, by public act must be received by a notary public, in presence of three witnesses residing in the *place* where the will is executed, and of five residing out of it.

By the 1587th article, it is declared that by the residence of witnesses in the *place* where the testament is executed, is understood their residence in the parish where that testament is made.

A nuncupative testament by public act, executed in the presence of three witnesses who do not reside within the parish, is null and void.

In the present case there were but three witnesses, and they did not live within the parish, the testament is therefore null and void. *La. Code, 1588.*

It has been contended, that as the house was situated near the dividing line of the parishes, and the witnesses were drawn from the immediate neighborhood of the testator's domicile, the spirit of the law was complied with. Perhaps it was, but the law says the *formalities* prescribed must be pursued, otherwise the testament is null and void. The legislature having made parochial limits, and not distance the criterion, we cannot substitute the latter, and if we did, we should soon be involved in the difficulties which we have not doubted induced the law makers to establish a rule of a different kind. What distance would be sufficient, one mile, half a mile, or five? The decision on such grounds would be necessarily arbitrary, and introduce great uncertainty and confusion.

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It was urged, however, that although the law declares a will invalid for such grounds as these, still no testimony could be introduced to prove the facts by which the invalidity is established, unless the will be alleged to be false *argué de faux*. The provision in our Code on which this objection principally rests, is found in that part of it which treats of the proof necessary, before the execution of wills can be ordered. It declares that nuncupative testaments do not require to be proved, unless they are alleged to be forged. The defendant says it should be, unless they are false. Admitting this liberty could be taken with the text, we do not think the law applicable to the case before us, for the notary does not declare that the witnesses are residents of the parish of Orleans. Therefore, unless we concluded that though the will was invalid, it could not be set aside, because the notary had so worded it that his allegations could not be charged to be false, the objection to receive the parol evidence cannot be sustained. *La. Code, 1640.*

The defendant next objects that although the will may be null and void, yet the court erred in deciding that all the proceedings which had taken place under it, were null and void. We agree with the defendant that there was error in so decreeing, if by such a decree it was intended to decide that all the purchases made at a sale ordered by the court,

Sales of property made under a will, which is null and void, cannot be set aside by the court, unless third persons who have obtained an interest in the property are made parties

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were of no effect and conferred no title. We doubt extremely the correctness of such a position, and we are clear no such decision could be made, unless in a case where the third parties who had obtained an interest in the property were before the court. We think the proper decree would have been to direct the executor to render an account of what he had done under the will, which the court set aside; to have ordered him to bring into court all the moneys he had received of the estate, and all the securities and obligations which he had obtained under the sales made by order of the court or otherwise, and to have reserved the question, whether he was not responsible for any damage which the plaintiff may have sustained, in consequence of his persisting to act under the will and sell the property of the estate, after suit was commenced to have that will set aside.

The plaintiff complains of the judgment below in two respects, and has prayed that it may be amended.

The first is, that the court ordered the defendant to bring the money, etc., of the estate into court, instead of ordering it to be paid over to the plaintiff.

The second is, that the estate was burthened with the costs incurred by this suit.

The defendant objects to the right of the plaintiff to receive the proceeds of the estate; that by his own showing there is a previous will, and that it is to the executor or executors of that will the proceeds should be paid over.

As the present defendant has no right to retain the property of the succession, and must at all events bring it into court, it would seem no concern of his to make opposition to the plaintiff's right to receive it. He does not represent the executors of the first will, nor the collateral heirs. However, the judgment rendered below, compels us to inquire into the plaintiff's right.

We think the court did not err. The plaintiff has referred us to the 921st article of the Louisiana Code, which permits the natural child to be put in possession of the effects claimed by him as heir on giving security. But in the present instance he claims expressly as legatee under an universal title, and

there appears to be others to whom bequests are made in the same testament. We think the executors of that will, or in case of their neglect to act, a dative testamentary executor should carry its provisions into effect. What may be the right of the plaintiff in case he renounces all the benefits conferred by the will, and should hereafter claim the property as heir, we need not inquire.

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The remaining question relates to costs. The plaintiff contends the estate should not be responsible for them, as the will was not that of the deceased. We think it ought, the costs were incurred in this case in consequence of the act of the testator, and it was the duty of the executor to maintain the validity of the will.

An estate is liable for the costs incurred by an executor, under a will which is null and void, in endeavoring to sustain its validity.

It is, therefore, ordered and decreed, that the judgment of the Probate Court be reversed, and it is further decreed and adjudged, that the order of the Court of Probates, bearing date the 24th January last, directing the registry and execution of the will of the late Phillippe Sterlin, passed before Carlile Pollock, notary public, be rescinded; that said will be declared null and void; that the defendant, Celestin Gros, do render to said court a full and complete account of his administration under said will, and that he bring into court all the moneys in his hands belonging to the estate, and all the notes and securities which he may have received from the sale thereof, or which otherwise have come into his hands; and it is further decreed, that the will made before Marc Lapille, on the 19th October, 1823, be declared valid as the last will and testament of the said Phillippe Sterlin. The costs in both courts to be paid by the succession. This decree, however, being without any prejudice to any claim which the plaintiff may have against the defendant for damages, which the former may have sustained by the acts of the latter, subsequent to the institution of the suit.

If a will be declared null and void, the executor under it, will be decreed to render to the court an account of his administration, and to bring into court all the moneys and credits of the estate in his hands.

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VIGNIE vs. BLACHE.

VIGNIE
vs.
BLACHE.

APPEAL FROM THE COURT OF PROBATES OF THE PARISH AND CITY OF NEW-ORLEANS.

He who is injured by an injunction, though not a party, may appeal from the decision of the court below refusing to dissolve it.

The Register of Wills cannot be made a defendant in a cause to test the correctness of an order of the court directed to him.

The plaintiff brought this suit to enjoin the register of wills, for the parish of New-Orleans, from selling a certain house and lot, and to rescind the order of court given for that purpose. The plaintiff had purchased the house and lot at a sale by the register of wills, and received the certificate of the latter, purporting to give a complete title to the premises. The plaintiff took possession and has since retained it, and offers to comply with the terms of the sale on his part. The sale was to effect a partition of the property of certain heirs, who obtained a subsequent order to sell the same property. The plaintiff seeks to protect himself from the effect of this second order.

The injunction having been granted, one of the heirs ruled the plaintiff to show cause why the petition should not be dismissed and the injunction dissolved. This rule was discharged, and the intervening heir appealed.

D. and J. Seghers, for appellant.

1. The petition shows no defendant in the cause.
2. It is contrary to art. 171, 172 of the *Code of Practice*.
3. The injunction is a conservatory act which may accompany the demand. *Code of Practice*, p. 74, sec. 4.
4. It is a provisional order which may be obtained to give effect to the suit, and cannot therefore be granted except in a suit. *Code of Practice*, art. 208, 209.
5. In order to proceed against the register of wills, or the sheriff, a suit must be brought claiming something. But here

nothing is claimed, neither possession nor damages, nor is there a defendant to the action. There is therefore no suit.

6. The plaintiff complains in his very petition, that he is disturbed by the heirs of Crévon. He ought to have proceeded against them by a possessory action, and prayed for an injunction as an accessory to his petition, or to have made them parties to this suit, if a suit there be.

7. When an injunction is prayed for, it may be set aside on motion and in a summary manner.

8. The judgment is a final one in the possessory action, and leaves only open to the heirs of Crévon the petitory action, thus depriving them of the right of having the property sold *immediately*, without having been heard, and without an opportunity having been afforded to them of being heard.

9. The heirs of Crévon have a right either to proceed against Vignié by causing, on motion, his petition and injunction to be set aside, or by instituting a new suit against him. The choice is theirs.

Denis, contra.

MARTIN, J. delivered the opinion of the court.

The petitioner alleged he had become the last and highest bidder of a house and lot, at the sale by the defendant, register of wills, in pursuance of an order of the Court of Probates to effect the partition of a succession, and on its being adjudicated to him, he had gone into possession with the regular certificate, and has enjoyed it for upwards of one year, during which time he tendered the price to that officer, who declined to accept it; that the same has never been demanded by the heirs, who have never put him *in mora*; that notwithstanding this, the defendant has again offered the house and lot for sale, to the great injury and annoyance of the plaintiff. On these facts he obtained an injunction, which one of the heirs made an unsuccessful attempt to have dissolved and the suit dismissed, and appealed.

The appellee has contended that no appeal lies from the refusal to dissolve the injunction.

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VIGNIE
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He who is injured by an injunction, though not a party, may appeal from the decision of the court below refusing to dissolve it.

It has appeared to us, that whatever may be the case, in many cases the appellant who was not made a party below, and who has an interest in having an injunction dissolved, would suffer an irreparable injury if he were not permitted to appeal, as the sale he has provoked could never take place, the register of wills, who has been made a party, being without any interest to contest the plaintiff's pretensions, and the intervening party having failed to obtain the only relief he could have. We therefore conclude, that the appeal was properly taken.

On the merits the appellant has shown that the petition has no defendant in the cause, and is contrary to the Code of Practice 171 and 172; that an injunction is a conservatory process accompanying a demand, *ibid.* 74, sec. 4, or a provisional order to give effect to a suit, and cannot therefore be given except in a suit. *Ibid.* 208 and 209.

The Court of Probates was of opinion, that although in the article of the Code last cited, an injunction is classed among conservatory acts, which may accompany a demand, the petitioner being disturbed by the register, in the possession which he has had for a year, might seek relief against the disturber. *Ibid.* 298.

The register of wills cannot be made a defendant in a cause to test the correctness of an order of the court directed to him.

In our opinion the Court of Probates erred. The heirs who purchased the second sale were the real disturbers, if any there was. The defendant, as register of wills, was the ministerial officer, who was to carry the order of the court into execution, which could not be enjoined without a bond being given to the party who might sustain an injury by a wrongful delay; the register could not receive any injury personally, except in being delayed in receiving his fees. he had no right to stand on judgment to contest or admit the petitioner's pretensions.

An heir having intervened and made himself a party, we have doubted whether, as the facts sworn to and uncontradicted, show a proper case for relief, if proper parties were made, this did not appear to be one of those cases in which an injunction improvidently issued is sustained, because on the dissolution, the applicant would be entitled to a new one,

but the sale is ordered to effect a partition among heirs, one of whom only is in court, and does not appear authorised to act for the others; the applicant has not brought them in; he does not allege that the order has been improperly obtained from the court; it is not urged, that the register acts by their order, or as their agent, which renders it extremely doubtful, whether they could avail themselves of the bond given to the register for the recovery of damages resulting from injudicious delay.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court be annulled, avoided and reversed, the injunction dissolved, and the petition dismissed with costs in both courts.

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WILEY ET AL.
VS.
DE ARMAS.

WILEY ET AL vs. DE ARMAS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where the case turns on the meaning of certain words, which are not free from doubt, the construction given by the jury and the court below, will be followed.

The facts of this case are fully set forth in the opinion of the court, pronounced by PORTER, J.

This action is brought on a promissory note, in these words, "New-Orleans, April 24, 1831. I hereby bind myself to pay Messrs. Wiley & Cuninghame, sixty days after the work is all finished, the amount of their bill, as slaters, for covering my house at the corner of St. Peter and Rampart streets, say to the amount of six hundred dollars, and the payment shall go in deduction of such amount as to be claimed by M. M'Cleary; this obligation, in part, is given by virtue of an order of M. M'Cleary."

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To a petition claiming this amount, and forty-four dollars and fifteen cents for additional labor done by the petitioners on the house of the defendant, at their special instance and request, the defendant answered, that he was not liable to pay the amount claimed, as by his agreement he was to pay the plaintiffs out of the sum he should remain indebted to M'Cleary, the undertaker, when the whole of the work undertaken by him should be finished; that the said work is not finished, and that the plaintiffs had become security for its faithful performance, and that in consequence of the failure of the said M'Cleary, the defendant has paid two thousand dollars more than he owes.

The cause was submitted to a jury, who found a verdict for the plaintiffs. The defendant appealed.

The case has been submitted without argument. The case appears to us to turn on the interpretation to be given to the words, "*sixty days after the work is all finished, the amount of their bill, as slaters.*" The meaning attached to them by one of the parties, is, that the agreement by the contractors to build the house was to be entirely fulfilled, before the plaintiffs were to be paid. The other contends, that their work, as slaters, was to be finished before the note could be considered due. The case is not free from doubt, and we do not feel authorised to put a different construction on the words, from that attached to them by the jury and the court below.

Where a case turns on the meaning of certain words, which are not free from doubt, the construction given by the jury and the court below, will be followed.

There is prayer for damages for a frivolous appeal, but we do not think the case one in which they should be allowed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

De Armas, for appellant.

Sterrett, for appellee.

LYLES vs. MARTIN ET ALS.

EASTERN DIS.
February, 1833.APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE THEREOF
PRESIDING.LYLES
vs.
MARTIN ET ALS

Where a party enters into a contract for the purpose of avoiding litigation, based on full confidence in words told him that "illegitimate children could claim the succession of their mother as forced heirs," the party acts under error of law, for which the contract cannot be rescinded.

This suit was brought to rescind a contract by which the plaintiff had released all her claims upon certain slaves. The plaintiff sought also to recover the slaves as the forced and only heir of her deceased daughter. The defendants were the natural children of the plaintiff's daughter.

The defendants pleaded a general denial. The cause was tried and a judgment rendered for the defendant. The court considered the case as governed by the 1840th article of the *Louisiana Code*. The plaintiff appealed.

MARTIN, J. delivered the opinion of the court.

The plaintiff claimed the rescission of a contract made under the following circumstance.

The defendants are the natural children of her daughter, on whose death she made a contract, by which she recognized them as the natural children of their deceased mother, and stated that she and they had, for the sake of avoiding litigation, compromised and made a transaction with regard to certain slaves left by the plaintiff's daughter, and their issue, by which the descendants, in their capacity of heirs to the deceased, ceded to the plaintiff the usufruct of two of the slaves during her natural life, and she renounced all her right to the remaining slaves, ten in number, in favor of the defendants, as natural children and heirs of her daughter.

The rescission was asked on the ground, that at the time of this contract, she had no other property, and therefore, it

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Where a party enters into a contract for the purpose of avoiding litigation, based on full confidence in words told him that "illegitimate children could claim the succession of their mother as forced heirs," the party acts under error of law, for which the contract cannot be rescinded.

was void as a donation. Further, that there was such an error in the cause and consideration of the contract, that it was null and void; *Louisiana Code*, 1818, 1827; it having been falsely represented to her that the defendants, as natural children, were the forced heirs of her daughter, and would, in that capacity, recover all the slaves.

There was judgment in favor of the defendants, and the plaintiff appealed.

The contract, the rescission of which is sought, was entered into in 1830, and must be regulated by the new Code. The error, under which it is alleged the plaintiff labored, was one of law if any error there was, viz: that the defendants, the illegitimate children of her daughter, could claim the succession of their mother, as her forced heirs.

The petitioner avers in the petition, that "her only object or motive in making said contract, was *for the purpose of avoiding litigation*, respecting the title of said slaves; they being claimed by the defendants, in their supposed quality of heirs to their mother."

The Code expressly provides, that a contract made *for the purpose of avoiding litigation*, cannot be rescinded for error of law, *art. 1840, sec. 2.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Morgan, for appellant.

Ogden, for appellee.

BOURGUIGNON vs. DESTREHAN.

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February, 1833.BOURGUIGNON
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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The pendency of another suit between the same parties, for the same object, growing out of the same cause of action, instituted previous to the present suit, will not be noticed by the court, unless specially pleaded.

The vendor of land, who conveys by a bad title, cannot be considered a trespasser, if his vendee is suffered to remain in possession long enough to acquire the right of possession.

Such a vendor is not liable, after his vendee has acquired the right of possession, for the rents and profits received by the latter.

The plaintiff claims of the defendant the sum of fifteen thousand dollars, for the rents and profits of a certain piece of ground, and for expenses incurred in obtaining possession.

The petition shows the plaintiff to be the owner of the ground. The defendant had illegally taken possession, which was restored by a judgment of the court in a former suit. The plaintiff had been deprived of possession for about seventeen years.

The defendant pleaded the general denial and prescription.

On the trial the case was submitted to a jury who returned a verdict in favor of the plaintiff, for five hundred and forty dollars. A new trial was granted to the defendant on the ground that the verdict was contrary to law and evidence. On the second trial the jury found for the plaintiff for fifteen hundred dollars. A new trial was granted, and the third jury found for the defendant. A new trial was then refused and the plaintiff appealed.

PORTER, J. delivered the opinion of the court.

The petition states, that the defendant had taken possession of property belonging to the plaintiff, which he refused

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to give up; that at last suit was brought against him, and by a decree of this court he was ordered to restore possession.

It further alleges, that although the petitioner has been put in possession, yet he has suffered damages to a large amount for the space of seventeen years; that he has been deprived of his property, and that he also sustained great expense in carrying on the petitory action he was compelled to resort to. The sum total of the damages is averred to be fifteen thousand dollars, and judgment is prayed for that amount.

The answer contains a general denial, to which was afterwards added the plea of prescription.

The case has been before three juries. The first found a verdict in favor of the plaintiff for five hundred and forty dollars; a new trial was granted, and the second jury estimated the damages at fifteen hundred dollars. This verdict was also set aside by the court, and the case again submitted to the country. The last jury found a verdict for the defendant, and the judge approving it, gave judgment accordingly. The plaintiff appealed.

The case has been submitted to us without argument, or without any *points* to direct our attention to the matters which the parties might suppose were really in controversy.

In looking into the record, it appears that damages were attempted to be proved on two grounds. The first, a trespass committed by the defendant's cattle on the premises of the plaintiff; and second, the rents and profits of the property formerly in dispute, during the whole time it was possessed by Boudousqué who was the vendee of the present defendant.

The pendency of another suit between the same parties for the same object and growing out of the same cause of action, instituted previous to the present suit, will not be noticed by the court unless specially pleaded.

The pleadings in the former action have been given in evidence in this, and on recurring to them we see that Boudousqué, the party in possession, and Destrehan, against whom this suit is brought, were both made parties to it, and after a very attentive consideration of what was asked for then, and what is demanded now of the defendant, it is our opinion that the very same matters are put at issue in both actions. In the first case, judgment has been given for the

land, but the question of damages is yet undecided. We do not, therefore, see precisely the grounds on which this action could be maintained, if the pendency of that first brought, had been pleaded in bar; as it is not, we are compelled to go into the merits.

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February, 1832.

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vs.
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The second ground on which the damages are claimed, presents the question as to the responsibility of the defendant in this form of action, for the rents and profits of the land during the time it was in possession of Boudousqué, his vendee. The court below charged the jury he was not responsible, and the plaintiff excepted to that opinion. The question is somewhat novel, for we do not recollect having ever before seen such a suit brought in our courts. The only grounds on which we can conjecture it was supposed the responsibility of the defendant could be maintained, were, that the vendee was a trespasser, and that the vendor under whose permission he entered into possession was also one. If the first proposition were true, then perhaps the other would follow, it being a familiar doctrine of our law, that if A commits an illegal act by command of B, they are both considered as actors in the infliction of the injury, and are both liable for the consequences which may flow from it.

But after the best consideration we have been able to bestow on the case, we are of opinion that the vendor of land who conveys his right in it to another, although his title be a bad one, cannot be considered as a trespasser, and subject to the responsibility of one, if his vendee is suffered to remain in possession long enough to acquire the right of possession. It is true, trespass may be committed on land, but in order that the interference, injury, or act, may amount to such, it is essential that the right of possession in another be disturbed. The action of *réintégrande* in the civil law, by which possession is restored, and damages given for the injury inflicted by the trespasser is confined to the party having the right of possession. At common law, the ground of the action of trespass on land, is the injury to the possession. *Pothier traité de possession*, nos. 114 and 115. *Kent's Commentaries*, ed. 1832, vol. 4, 120. By our law, however, if the party ille-

The vendor of land who conveys by a bad title, cannot be considered a trespasser if his vendee is suffered to remain in possession long enough to acquire the right of possession.

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Such a vendor is not liable, after his vendee has acquired the right of possession, for the rents and profits received by the latter.

gally entering on the land, is suffered to remain therein for a year, the owner loses the right of possession, and is driven to his petitory action to recover the property. The rents and profits accruing after that year, or the fruits gathered, for which the possessor may be responsible, are given on entirely different principles from those for which reparation is afforded for a trespass, and his responsibility varies according to circumstances. If the possessor be in good faith he makes them his own, up to the time suit is brought to recover the property. If in bad, he owes them during the time of his possession. For their recovery the law has given an action in express terms against the person who has enjoyed them, and it is totally silent in regard to recourse against the person under whose title the possession was first taken. This silence in relation to responsibility for the fruits which may be due in a petitory action, and the express declaration that the party who commands the trespass, or under whose authority it is committed is subject to the possessory action, and may be made responsible to the proprietor for the damages sustained by him, is a just reason for courts to assume that no such action was contemplated to be given, in a case such as that before us. *Pothier traité de possession*, nos. 118 and 123.

In the case first put, where the vendee makes the fruits *his own* in consequence of the belief that he was the owner, it would be difficult, nay, impossible, to conclude that the person who sold, even in bad faith to that vendee, should be responsible to the proprietor for that which the law expressly says belongs to another. In case the vendee is in bad faith, the absurdity it is true is not presented, but the grounds on which the possessor is made responsible for fruits, repel the idea that the vendor of that possessor is bound to make them good. These grounds are two: First, that the fruits, whether natural or the result of industry, or whether already gathered or not, are considered as accessaries to the land, and must be restored with it. The maxim of the Roman law was *omnis fructus non jure seminis, sed jure soli percipitur*. The second is, that every possessor in bad faith is considered to have impliedly contracted with the proprietor the obligation

to preserve the thing for him, and to deliver it to him with every thing which belonged to it. *Pothier traité du droit de propriété*, nos. 151, 335, 336.

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There is another ground why a vendor of land whose vendee is evicted by a petitory action, cannot be considered as a trespasser, and subject to the responsibility of one. Our law refuses to one trespasser who has paid damages, an action for reimbursement against his co-trespasser, or against him under whose authority he inflicted the injury, and yet it is clear, that the vendor with warranty is subject to an action by his vendee, for the repayment of the fruits he may be compelled to return to the proprietor. *La. Code* 2482, 3 *Martin's Rep. O. S.* 288. It appears to us, that no action lies by the owner of the land, against the vendor of the party, who is evicted in a petitory action, for the fruits or revenues; that he can only be reached by recovery from his vendee, to whom he may, or may not be responsible in warranty, according to the circumstances of the case, and the nature of his engagement.

The plea of prescription is presented to the claim for damages for the entry of the cattle of the defendant in the field of the plaintiff, and there is no evidence on record which shows that the suit was brought within the delay given by law for actions of this kind.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

Appellant, in propria persona.

Rost, for appellee.

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MAYOR ETC. OF
NEW-ORLEANS

VS.
RIPLEY ET AL.

MAYOR &c. OF NEW-ORLEANS vs. RIPLEY ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

All the co-obligors in a bond must be prosecuted to judgment.

The court cannot act on the extrajudicial information of its members, in relation to the facts of a cause.

The words "We promise to pay," create a joint obligation only.

An ^{obligation} objection given as collateral security for a debt of a third person, does not subject the makers to the laws of sureties.

It is sufficient for the defendants sued on an obligation, to show, that all the co-obligors are not made co-defendants, and the plaintiff must establish the facts which make the case an exception.

This cause is now in this court for the second time. When it was first called for trial in the court below, the defendants challenged the jurors on the ground that they were members of the corporation. The court sustained this objection, and the plaintiffs appealed. The cause was remanded by this court on the ground that the *Code of Practice*, which excludes such jurors as have a direct or indirect interest in the cause, was amended in this respect by the act of 1825, admitting jurors who are members of a corporation, which is a party to the suit. *Vide 2 La. Rep. 344.*

After the cause had been remanded, the court below, on motion of the plaintiffs, ordered the cause to be discontinued as to three of the defendants. No reason was assigned on the record for this order.

At the trial, on motion of the defendants, the court ordered the cause to be dismissed, on the ground that the cause had been improperly discontinued as to three of the defendants. The plaintiffs appealed.

Eustis, for appellants.

1. The words "we promise," express a joint and several obligation.

2. The *Louisiana Code* only provides, that all the co-obligors shall be sued, and does not prevent a discontinuance as to some of them.

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I. W. Smith, for appellees.

1. The words of the note, "We promise to pay," &c. must not be construed separately, but collectively, and only upon that construction they create an obligation.

2. No solidarity is expressed, it cannot be implied, and the defendants are in no event liable for more than their respective virile shares. *Nueva Recopilación*, lib. 5, title 16. l. 1. *Old Civil Code*, p. 278, art. 102. 3 *La. Rep.* 568, *Percy vs. Millaudon*.

3. The union of these co-obligors is not governed by the laws which control commercial partnership. 2 *La. Rep.* 419, *Bennett et al. vs. Allison*.

4. Judgment cannot be rendered against one of these defendants separately, but all the co-obligors must be made co-defendants; and all must continue such until the termination of the suit, or no judgment whatever can be rendered. *La. Code*, 2081. 3 *La. Rep.* 437, *Barrow vs. Norwood*.

5. The inferior court, therefore, properly dismissed the suit, after the plaintiffs had discontinued against three of the co-obligors, and assigned no reason for it upon the record. *Vide* the authorities last cited.

6. The court cannot take judicial cognizance of well known facts affecting the merits of the case, if these facts are not spread upon the record.

PORTER, J. delivered the opinion of the court.

This action is brought on a promissory note, which was made in this form: "We promise to pay," &c.; and it is signed by several persons who were made parties to the suit. Before the cause came on for trial, the counsel for the plain-

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tiffs moved to discontinue the cause, as to three of the defendants, J. W. Smith, E. Fiske, and John Brown.

On the trial, the defendants moved that the cause should be dismissed, on the ground that the obligation was joint, not joint and several, and that by our law, suit must be brought and prosecuted to judgment against all. The court sustained the objection, and ordered the suit to be discontinued. The defendants appealed.

The first objection taken to the correctness of the decision given below, is, that the articles of the *Louisiana Code*, on which this decision was made, do not require all the co-obligors to be prosecuted to judgment; it is sufficient if they be made parties in the first instance, and this being done, the action may be discontinued against the others.

All the co-obligors in a bond must be prosecuted to judgment.

This proposition in the general terms just stated, cannot receive the assent of the court. Whether there may not be exceptions to it, arising out of the want of jurisdiction in the same tribunal before which the suit is pending, to bring all the parties before it, we need not inquire; for there is no evidence on record to show to us that the parties, against whom this action was discontinued, were not legally responsible, and equally amenable to the jurisdiction of the court with the other defendants. It has indeed been urged on us that the judges of this court have individual and extrajudicial knowledge, that one or two of the parties are dead, and the other a bankrupt. This court never has, or never can act on the information of its members in relation to the facts of a cause. Its duty is to decide the case on the evidence received in the court below. And we can only give such judgment as the inferior tribunal might have given on the proof adduced to it.

The court cannot act on the extrajudicial information of its members, in relation to the facts of a cause.

We are, therefore, compelled to examine whether the obligation sued on, was joint, or joint and several.

By our law, an obligation *in solido*, cannot be presumed, it must be expressed.

The question then is, whether, if several persons bind themselves by these words, "we promise to pay eight thousand five hundred dollars," they express that each one of

The words, "we promise to pay," create a joint obligation only.

them is to pay eight thousand five hundred dollars? We think not; because from the terms of the obligation, it is to be performed not by one of the obligors, but by all of them.

Until the matter was stirred in this case, we thought it was of universal understanding, that an obligation expressed in the terms just given, created a joint, not a joint and several obligation. But we are told that no case can be found where such a decision was given. If none such could be found, the cause might be sought for in the fact, that the effect of such a contract was, perhaps, rarely questioned before.

Chitty tells us, "that when a promissory note is made by several, and expressed, *we promise to pay*, it is a joint note only; but if signed by several persons, and begins *I promise to pay*, it is joint and several. *Chitty on Bills, ed. 1819, 351.*

A cause was decided in Pennsylvania, on a bond in these words: "We do bind ourselves, our heirs, executors, administrators, and *every of them*," &c. It was held a joint, not a joint and several obligation. *Wharton's Digest, p. 90.*

And there are a great many cases in the books, which clearly proceed on the idea, that such words create a joint obligation, because they turn on the effect of other words being added to them, which make the engagement one *in solido*. A number of them are collected in *Bac. Abridgment, vol. 5, 164 to 166.*

But be the authorities in that system of jurisprudence what they may, we are of opinion that under the provisions of our Code, the words "*we promise to pay*, do not express an obligation that each one of the parties signing shall pay the sum which is promised by all.

We do not think there is any weight in the objection, that the obligation, in this instance, having been given to secure the payment of a debt due by others, it must be subject to the law which governs sureties. The proof adduced, shows, that the parties signing it were not bound for the principal debt. The engagement was independent of it, and received as collateral security.

It was contended, that the defect of not joining all the co-debtors in the suit, should have been pleaded by way of

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An obligation given as collateral security for a debt of a third person, does not subject the makers to the laws of sureties.

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It is sufficient for the defendants sued on an obligation, to show, that all the co-obligors are not made co-defendants, and the plaintiff must establish the facts which make the case an exception.

exception, and that it was the duty of the defendants at the same time to show that those who were not sued were amenable to the jurisdiction of the court.

Admitting the regular practice to be, that this matter should be pleaded in *limine litis*, we do not see how the plaintiffs could be benefited by the recognition of the rule. All the obligors were made parties, in the first instance, to the suit. The plaintiffs, after issue joined, discontinued as to some, and by doing so left the defendants no remedy but to take advantage of it at the trial. As the general rule is that all must be sued, and the exception, if it be one, is that the co-debtors cannot be brought before the court, we think it is sufficient for the defendants to show that all are not made parties, and that it is the duty of the plaintiffs to establish the facts which makes their case an exception.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BRUNET vs. DUVERGIS, SYNDIC, &c.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If a sale of property by an insolvent be fraudulent, his syndic cannot treat it as a nullity, but should bring an action to have the contract annulled.

Creditors, at the time of the sale only, can dispute its validity.

This suit was brought by a minor, assisted by her natural tutor, to recover two slaves. The defendant was the syndic of the plaintiff's natural tutor, who had become insolvent in his own capacity, and as a member of a commercial firm. The

tutor, in making his surrender, had placed the slaves in question upon his schedule as part of his estate. By public act, annexed to the petition, it appeared that the slaves were purchased by the plaintiff, in her own name, assisted by her natural tutor.

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The syndic alleged that the slaves were purchased with the funds of the firm, or of the natural tutor, when in insolvent circumstances.

The plaintiff had judgment, and the defendant appealed, with respect to one of the slaves.

Potts, for appellant, contended:

1. That this was a purchase of real estate with the partnership funds, and could not be alienated by one partner without the consent of the other, to his injury. *Richardson vs. Packwood*, 1 N. S. 290. *Simmons vs. Parker*, 4 N. S. 200.

2. That whilst the partnership is proceeding, and their affairs unliquidated, one partner cannot by donation *inter vivos* to the fraud of other creditors, give away the effects of the concern.

3. And therefore, Anathalie Brunet is a mere stake holder, *a'cestui que trust* for the benefit of the partnership, and the creditors of it.

Lockett, for appellee.

1. The plaintiff contends, that the syndic had no right to take possession of the slaves in question, as they did. They should have instituted suit to set aside or avoid plaintiff's title first. See the case of *Henry vs. Hyde*, 5 N. S.

2. The insolvent, at the time the slaves were purchased, was solvent, and had from eight thousand to ten thousand dollars, over and above his debts. Defendants could not then have been injured by the act, even admitting it to be a donation. There is no evidence which shows that the defendants were creditors at the time the sales in question were passed; therefore, under the 1988th article of the *Louisiana Code*, the defendants cannot succeed in their demand.

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3. There is no evidence which tends to show the least unfairness in the transaction, and not a shadow of fraud is pretended, as the case stands upon the evidence of the defendants themselves.

PORTER J. delivered the opinion of the court.*

The petitioner is a minor, and appears in court by her natural tutor. She sues to obtain possession of two slaves, which the defendant, as syndic of Brunet & Ashton, had taken into his possession.

The defence is, that the father, who appears in court as tutor to the child, surrendered the property sued for, as the property of Brunet & Ashton; that payment was made for it out of the funds of the firm, when they were in insolvent circumstances; and that the purchase was made to defraud the creditors of Brunet & Ashton.

If a sale of property by an insolvent be fraudulent, his syndic cannot treat it as a nullity, but should bring an action to have the contract annulled.

Creditors, at the time of the sale only, can dispute its validity.

The bills of sale for the slaves, were executed in the name of the petitioner. If the transaction was fraudulent, the representative of the creditors cannot treat it as a nullity, and take the property into his possession. He should bring an action to have the contracts annulled. 5 N. S. 634.

Again, no right of action is shown on behalf of the creditors, even if this was a case in which it could be properly inquired into. It is not proved that any of the creditors were such at the time the acquisition was made.

There was judgment in the court below in favor of the plaintiff. The defendant has appealed only in relation to one of the slaves; thus admitting the correctness of the decree to the other; for the reason just given, we think it should be affirmed as to both.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

* MATHEWS, J. was absent when this opinion was delivered

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POYDRAS vs. PATIN ET AL.

POYDRAS
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APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE THEREOF
PRESIDING.

Where the appeal bond is given for the sum ordered by the judge, the appeal is devolutive, although the sum does not exceed by one half the amount of the judgment.

It is not absolutely necessary that the appeal bond should be signed by the appellant in *propria persona*, or by any person for him not legally authorised.

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A fact is considered established, if proved by evidence which is not the best the nature of the case admits of, but which is received without exception.

The plaintiff seeks to recover the amount due upon three promissory notes; of one of which he is the payee; of another, the universal heir of the payee; and of the third, the assignee of the payee. The notes had been given by Gertrude Patin, and her husband, Pierre Abadie.

The defendants pleaded the general denial. Judgment was rendered against them.

The amount of the judgment was two thousand eight hundred and seventy dollars and forty-one cents. The amount of the appeal bond was three thousand dollars. The bond stated, that "we, Gertrude Patin, widow Berciron, wife of Pierre Abadie, duly authorised by her said husband, as principals; and Hypolite Patin and James Mitchell, as securities," &c. It was signed "Gertrude Patin, by her husband, Pierre Abadie, Pierre Abadie, Hypolite Patin, James Mitchell."

Denis, for appellant.

1. This cause is the same that was tried before this honorable court in.....No.....of the docket of this honorable court. And plaintiff could not be admitted to maintain a second suit on the same cause of action; the first having

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been finally tried and adjudicated upon. It formed in favor of defendants the exception of *res judicata*.

2. The notes on which this suit is brought, were extinguished, as appears by the endorsement or memorandum on them, made by plaintiff before the institution of this suit.

3. The judge of the District Court ought to have continued the cause, or granted a new trial, when he was informed, by affidavit, that A. Davezac, Esq., had been engaged to defend this suit, and that he had promised to attend. And that, therefore, the defendant had every reason to expect him, and that he did not attend. And also, when they were informed that Lloyd had been engaged, and that he departed the day previous to the trial of the cause.

Slidell, on the same side, contended:

1. That the testimony of George Richardson ought not to have been received; the petition contains no allegation to authorise it. If received properly, the contract was not binding, the wife not being authorised by her husband; further, the agreement, if entered into, was fraudulent and without a cause.

2. Madam Abadie is not liable, unless it be shown that the contract turned to her benefit.

3. There is no evidence of a transfer of the note drawn in favor of Julien Poydras.

Cuillier, for appellee.

1. The appeal bond is signed by no principal, and therefore could be recoverable against nobody.

2. The bond is not given for one half above the amount of the judgment appealed from.

MATHEWS, J. delivered the opinion of the court.

This suit is brought to recover the amount of several promissory notes, made by the defendant, Patin; one payable to the plaintiff for two thousand two hundred and fifty-two

dollars and thirty-four cents; another for one hundred and sixty dollars, payable to one Frederick Mareville; and a third payable to the late Julien Poydras, for four hundred and fifty-seven dollars and fifty-seven cents. The petitioner also claims interest to the amount of two hundred and eighty-seven dollars and fifty cents. The answer of the defendant is a general denial. Judgment was rendered in the court below in favor of the plaintiff, for the principal sums claimed, viz: two thousand eight hundred and seventy dollars and forty-one cents, with legal interest from the judicial demand; from which the defendant appealed. Pending the appeal she became insolvent, and it is now prosecuted by her syndic *ad litem* or *ad hoc*.

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A motion is made on the part of the appellee to dismiss the appeal on two grounds: First, because the appeal bond is not properly executed, not being signed by the appellant; and, secondly, because the bond was not given for a sufficient amount. This instrument purports to be signed by the defendant, through the agency of her husband, as principal, and James Mitchel, as surety; and is given for the sum ordered by the judge who granted the appeal. This sum does not exceed, by one half, the amount of the judgment; and in consequence of the deficiency, the appeal ought, probably, not to have been considered as suspensive. *Code of Practice*, 574, 575; and *2 La. Reports*, p. 88. But as the bond was given for the amount ordered by the judge, the appeal is clearly devolutive; and in this respect subjects the case to revision by the appellate court. The first ground assumed by the appellee to have the appeal dismissed, is equally untenable; even admitting that the bond was not signed by the defendant *in propria persona*, nor for her by any person legally authorised to that effect. The question raised, in the present case, has long since been settled by this court favorably to the pretensions of the appellant. See *9 Martin's Reports*, p. 1, the case of *Richardson vs. Tena*; and *10 ibid*, p. 74, the case of *Doane vs. Farron*.

Where an appeal bond is given for the sum ordered by the judge, the appeal is devolutive, although the sum does not exceed, by one half, the amount of the judgment.

It is not absolutely necessary that the appeal bond should be signed by the appellant *in propria persona*, or by any other person not legally authorised

After the judgment was rendered in the court below, the defendant moved for a new trial; and her counsel contends,

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that the District court erred in refusing it, and consequently that it ought to be ordered by this court, and the cause remanded for that purpose. The principal grounds on which a new trial was claimed, are set forth in an affidavit of the husband of the defendant, found in pages twenty and twenty-one of the record. This affidavit discloses nothing material, except alleged errors in conducting the cause; and contains no good reasons why the cause should have been continued; and as a necessary consequence, no legal grounds for a new trial. A jury had been prayed for, which was waived by consent of counsel, and the cause was agreed to be tried absolutely on a day fixed.

As to the merits, the defence is, that the notes on which the action is based, had been novated and cancelled previous to its institution. To ascertain whether these facts be true, it became necessary to give a concise statement of some occurrences which happened before the institution of the present suit. In March, 1816, the defendant being indebted to the plaintiff, a settlement of their accounts took place, through the agency of the husband of the former, and a payment was by her made at that time. Amongst the items placed to her debt, were the notes now in question; and also an hypothecary obligation, amounting with interest, to the sum of five thousand six hundred and ninety-nine dollars and fifty-seven and three quarter cents. The payment made on account at that time, was four thousand three hundred and sixty-two dollars and eighty-seven and a half cents. The creditor took upon himself to impute this payment to the notes now sued on, and some other items, in the account current; and afterwards attempted to proceed against his debtor for the recovery of the sum secured by the hypothecary obligation. The proceedings in that case were stayed by injunction, which ended in a decree of the court, directing the payment made on account, to be imputed to the discharge of the hypothecary debt, as being the most onerous, no imputation having been made by consent of the parties at the time of payment. See 6 N. S. p. 26.

The notes now in question, although purporting to have been paid off and cancelled, were retained by the creditor. The objections arising out of these promissory notes, can be considered as discharged only by payment or novation. No payment has been made in consequence of the charge of imputation ordered in the decree of the Supreme Court referred to, and which was made at the instance of the present defendant. Neither did any novation take place by the settlement of accounts between the parties in 1816. It does not appear that the debtor gave any new obligation by which the first must be presumed to have been cancelled and annulled. No new debtor was substituted in the place of the former, for the husband acted, not in his own right in relation to that settlement, but as agent for his wife, who was the real debtor.

Admitting this to be true, objections are made to the plaintiff's right to recover the amount of the two smaller notes sued on; one for one hundred and sixty dollars and forty cents, made payable to Marenville, and the other for four hundred and fifty-seven dollars and fifty-seven cents, to Julien Poydras. The first of these notes the plaintiff claims right to as heir to the promisor; on the trial of the cause, he proved his heirship by parol evidence. This, perhaps, was not the best the nature of the case admitted, but it was received without exception, and ought to be considered as establishing this fact. The right to recover the sum promised to Julien Poydras, is claimed by the plaintiff as assignee. The statement of facts found on the record, does not show any regular assessment made by the payee of this note, to him. But his right to recover payment seems to have been acknowledged by the defendant in the settlement of accounts above alluded to, and which makes a part of the evidence in the present case. This we deem to be sufficient to authorise a recovery of this part of the plaintiff's claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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A fact is considered established, if proved by evidence which is not the best the nature of the case admits of, but which is received without exception.

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DE ARMAS ET AL. vs. MAYOR, &c. OF NEW-ORLEANS.

DE ARMAS
ET AL.
vs.
MAYOR, ETC. OF
NEW-ORLEANS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Permission having been given by the Governor of Louisiana, when a province, to occupy and build on a lot of land in the City of New-Orleans, and the authority of the government, which gave the permission, having ceased without a change of will being expressed, a subsequent grant by the President of the United States to the occupant under that permission, vests in him all the right and title of the United States, and of the former sovereigns of the country.

While the province of Louisiana formed a part of the dominions of the King of Spain, he had the right of property in all the unappropriated territory of the province.

The King of Spain delegated to the Governor of Louisiana, while a Spanish province, the right to concede or grant to individuals, parts of the land belonging to the public domain.

The sovereigns of Europe have the right to alienate the vacant and unappropriated lands in their colonial dominions.

The word *quai*, includes the levee on the bank of the river, and the space between the exterior limit of the levee and the water.

The United States have full authority over ports of entry; they can establish, and perhaps abolish them; and they may regulate quays as appendages to them.

The circumstance that a space of ground is left vacant on the plan of a city, is not sufficient to show it to be a public place.

The plan of the city must show the destination and appropriation of lots to public uses, and as public places, in order to imply a promise on the part of the original owner of the soil and founder of the city, that the lots shall always remain open for the use of the public.

In deciding questions of title, the court cannot take into view the want of foresight in the sovereigns of the country in granting the land in controversy to individuals, or the great detriment which the public interest may sustain by the appropriation of the land to private purposes.

This was a petitory action, brought for the recovery of a piece of ground containing three thousand one hundred and

seventy-six superficial feet and four inches, situated in the city of New-Orleans, between St. Philip and Main streets, and between the river and the front row of houses.

The plaintiffs are the vendees of the heirs of Thomas Bertrand, or Beltran. His dwelling house having been destroyed by fire in the great conflagration of one thousand seven hundred and eighty-eight, in the city of New-Orleans, a few days afterwards he presented to the then governor of Louisiana, a petition, of which the following is a translation.

"Senor Governor: Antonio Beltran, an inhabitant of the city, states to your grace with the most profound respect, that the house which he inhabited having been burned on the twenty-first of this month, and having no place to take refuge in, he has determined to build a small house in front of that of Mr. Bienvenu; therefore, he earnestly begs that your grace would deign to grant him permission for what he asks, a favor which he expects from the goodness of your grace."

"New-Orleans, 28th March, 1788."

The decree of the governor was: "As is requested," and was signed by himself.

"MIRO."

Six years afterwards, Bertrand petitioned for the renewal of his privilege, as follows:

"Senor Governor-General. Thomas Bertrand, a *Cabaratier* of this city, states to your grace, with the most profound respect, that three months ago he presented a memorial to your grace, begging that you would grant him permission to rebuild a cabin (cabana) or small house which he has fronting the levee and in front of the house of the auditor of war, in consequence of the timbers of the said house having rotted by reason of the long continuance of the rains, having lost the few clothes or effects which belong to himself and his children. For this reason, and because the roof is about to fall in, he earnestly prays your grace, through your well known goodness, to give him leave to rebuild said house, since it is exposed to injury, from the condition of the materials, a favor which he expects from the great kindness of

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your grace, whose important life may it please God to preserve many years."

"THOS. BERTRAND."

"New Orleans, 17th June, '94."

This petition was granted in the following terms:

"NEW-ORLEANS, 16th June, 1794.

"Granted, but the same dimensions which the present house has, are to be preserved."

"THE BARON DE CARONDELET."

In one thousand eight hundred and three, Bertrand died. His widow (Gonzales) continued to reside in this cabin until after Louisiana was ceded to the United States. In one thousand eight hundred and seven, after congress established a board of commissioners to adjust land titles in Orleans Territory, Madam Gonzales procured one B. Lafon, (who styles himself deputy surveyor of J. Briggs, &c.) to lay off the ground on which her cabin stood, into a lot. Lafon states that he called on her for the papers which authorised her to have the survey made, and she presented him with the two *permissions* of Miro and Carondelet. From these two papers, the surveyor says he proceeded to measure off the lot to Madam Gonzales, in presence of witnesses, and to fix its boundaries, from which there resulted to her three thousand one hundred and seventy-six superficial feet, and four inches of ground.

The widow Gonzales filed these two *permissions*, and the *proces verbal* of Lafon's survey with the land commissioners. In reporting on her claim, the commissioners conclude by saying, "as we do not feel authorised to make any *decision* on this claim, we think it would be more an act of justice than of generosity, if the government should confirm it."

No special act was ever passed confirming it. But in eighteen hundred and twenty-one, a patent issued from the general land office, signed by the president of the United States, confirming "Madam Gonzales in her claim for a *lot of ground*, in the city of New-Orleans, fronting on the levee, &c." in pursuance of an act of congress, passed the second

of March, one thousand eight hundred and five, for the adjustment of land titles in the Territory of Orleans, and one of the twelfth of April, one thousand eight hundred and fourteen, for the *final* adjustment of land titles, &c.

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The plaintiffs allege that the patent was also authorised to issue on this claim, by the provisions of an act, passed May the eleventh, one thousand eight hundred and twenty. It provides, "that claims for lands in the eastern district of Louisiana, described by the register and receiver in their report to the commissioner of the general land office, on the twentieth November, one thousand eight hundred and sixteen, and recommended in the said report for confirmation, are hereby confirmed against any claim on the part of the United States."

The other two acts recited in the patent, provide: First, the one of one thousand eight hundred and five, in substance, "that persons who obtained from the French or Spanish governments, prior to October first, one thousand eight hundred, any duly registered warrant or order of survey of lands, and which were at that time actually *inhabited* and *cultivated*, shall be confirmed in their claims. Second, every person being the head of a family, who had prior to the twentieth of December, one thousand eight hundred and three, with the permission of the proper Spanish officer, and in conformity with law, usage and other customs of the Spanish government, made an *actual settlement* on a tract of land, &c., and who did on the twentieth of December, one thousand eight hundred and three, *actually inhabit* and *cultivate* the said tract of land, it shall be granted, &c."

The act of the twelfth of April, one thousand eight hundred and fourteen, says, "that every person claiming lands by virtue of any incomplete French or Spanish grant, concession, or any warrant or order of survey, granted prior to December twentieth, one thousand eight hundred and three, whose claims have not been filed with the proper officer, etc., and are embraced in the report of the commissioners, etc., in every case where it shall appear by the said report, etc., that the *concession warrant*, or order of survey, under which

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the claim is made, contains a special location, or *had been actually located or surveyed before the twentieth of December, one thousand eight hundred and three, shall be confirmed, &c.*"

The corporation of New-Orleans pleaded a general denial to the allegations of the petition. They show that they have possession of the *locus in quo*; that they exercise the right to regulate the use of it for the benefit of the public. They claim it as a part of the quay and port of the city. They allege that it cannot be the subject of private property; that no absolute grant was ever made to Bertrand; that the permissions above recited were only to build and occupy a temporary cabin on the levee. They allege that in pursuance of a decree of the Superior Court, in one thousand eight hundred and twelve, that Bertrand and his wife had no title; the family was removed, the cabin demolished, and the land cleared. They allege that at the foundation of the city by the French government, a large space denominated a *quai*, was left between the front row of houses and the river, for the use of the inhabitants of the city and the public; and that the *locus in quo* constitutes a part of this *quai*. They deny the authority of the Spanish government to grant or concede the lot in question, and the authority of the president of the United States, to issue the patent under which the plaintiffs claim.

The counsel for the corporation offered in evidence two plans of the city of New-Orleans, to show the *space* in which the *locus in quo* is situated, was designated on said plans from the foundation of the city, in one thousand seven hundred and twenty-four, and one thousand seven hundred and twenty-eight, as a "*quai*," and set apart for the use of the public. This evidence is admitted by the plaintiffs in the record, in the following terms:

1. "It is admitted there existed a long time before the French revolution, an officer or bureau attached to the department of the marine and the colonies at Versailles, in France, in which were deposited the manuscripts of all the plans of the cities founded under the authority of the French government in its colonies.

2. "That the plan of New-Orleans, the one made by Dupauger, in one thousand seven hundred and twenty-four, and the other by Broutin, in one thousand seven hundred and twenty-eight, which were produced by the defendants, in this case are the most ancient plans of said city, which were found in said deposite.

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3. "That the said Dupauger and Broutin were both engineers for the king of France, and employed as such in Louisiana at the time they made the aforesaid plans."

The record contains the following admission.

"It is admitted by the plaintiffs, that previous to the cession of Louisiana from France to Spain, there were several sales of lots made under the French government. Said lots fronting the river were sold with the description of *face au quai*."

Judgment was rendered in the court below for the plaintiffs, and the defendants appealed.

Moreau Lislet, for the appellants.

1. That from the foundation of the city of New-Orleans, all the vacant space figured or designated on the plan of the city, between the river Mississippi and the first row of houses fronting the river, was reserved by the founder to serve for the *quais* of the port of New-Orleans.

This proposition is supported by three ancient plans of the city. 1. That of Depauger, the king's engineer for this province, drawn in one thousand seven hundred and twenty-four. 2. Another plan by Broutin, royal engineer, made in one thousand seven hundred and twenty-eight. 3. And one which appears to have been made by the same engineer, of the city and its improvements in one thousand seven hundred and forty-four, and engraved in Charlevoix's History of New France, vol. 2. 432, 3.

2. That there existed from time immemorial at Versailles, in France, a bureau, attached to the marine department, where were deposited the official charts, plans, &c., of all the cities and fortifications of the French colonies in America. The corporation discovered there, in one thousand

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eight hundred and nineteen, the plans of New-Orleans, which were produced in evidence, and which are the most ancient plans of the city, existing in that bureau.

3. That in France, plans of cities are made, which serve for titles to the inhabitants thereof; and in default of these plans, long possession by the *inhabitants* supplies the place of ancient titles. *Favard de Langlade, Nouv. Leg. aux mots plans des villes* p. 224, art. 1, 4.

4. That in France and her colonies, by the word *quai*, is understood a levee often paved with stones in cities and ports on navigable rivers, and a space left vacant between the river itself, and the first line of houses, for the convenience of a passage or way, and to prevent the overflow of the water, &c. *Dict. de l'Académie Fr. verbo quai*.

5. That in France there exists, in all the cities bordering on navigable rivers and the shores of the sea, *quais*, which sometimes belong to private persons when there has been a grant to that effect; but generally, they belong to the public domain. In the first case, these *quais* are maintained and repaired by the proprietors; and in the latter case, by the municipal authorities of the place. Those who support the charge receive in compensation a certain right of toll on all vessels and craft which land or touch at these *quais*. 2 *Valin*, art. 20 and 21, and notes, p. 475, 6. 1 *ibid.*, art. 7 and note p. 140.

6. Whether *quais* belong to private persons, or to the public domain, the regulation of them is in the admiralty, but the use of them is in the public.

7. That public things, such as *quais*, are in the domain of the sovereign, but he cannot sell, grant, or otherwise dispose of them, unless for the common advantage or the public good, without abusing his powers. The sovereign himself has often declared his own acts null in this respect. *Vattel*, sec. 244, 5, 6. 3 *Martin*, 296, 303. 7 *N. S.* 81, 88, 92. *Recopilación*, lib. 7, tit. 7, l. 1. 3 *Toullier*, no. 27, 30, 31 and 32.

8. In France, *quais* do not mean simply a levee made of earth, or paved, which guard the city from inundations of the river, but they mean also a certain space of ground, which is

more or less considerable, as circumstances require, and which remains free to the use of the public, either for ornament, a public way or passage; and which is contained between the levee and the first row of houses fronting the river. *History of St. Domingo, by Moreau de St. Mary*, 1 vol. 305, 309. *Laws and constitutions of the French colonies, sous le vent*, 3 vol. 447, 771. 2 *ibid.* 725. 4 *ibid* 771, 2, 3, 1791, 1796. 5 *ibid.* 473, 651. 6 *ibid* 526, 568.

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9. That this space of ground, (*terre plein*) which is left open and free in France, in cities situated on rivers or navigable streams, is still more necessary in Louisiana, on the banks of the Mississippi, than in other countries, because the banks of this river are subject to fall in, and the riparian proprietors, even those in cities, are bound to make and repair their levees at their own expense; and to furnish land for new levees, when the first are carried away, by the irruptions of the river. *Vide Ordinances sur les Concessions.*

10. When Louisiana was under the French government, and since, even to this day, the levee in front of the city of New-Orleans, has always been made and repaired by the inhabitants of the city, or at their expense, without any compensation than a small toll on boats and vessels, which loaded and unloaded their cargoes in the port. *Vide Charlevoix's History of New France*, 2 vol. 432. *O'Reilly's Ordinances*, 20th February, 1770.

11. That the city of New-Orleans was not in reality established, until the year one thousand seven hundred and twenty-two and three, in the place where it is at this day, and the plan of Dupauger, dated in one thousand seven hundred and twenty-four, was in all probability made out about this period. Louisiana was then under the government of the western company, to whom the king of France had granted the exclusive privilege of its trade and commerce, with a species of sovereignty over its territory; such as the right of exploring and working its mines, making grants of its vacant land, and founding cities, &c.

12. The western company retro-ceded and abandoned its privileges to the king of France, and re-sold to him all its

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possessions in Louisiana, without making particular mention of the public property it owned in New-Orleans, or the *quais*, which proves it had established them for the public use of the inhabitants of that city. *Vide Charlevoix's History, &c.* 1 *Martin's History of Louisiana*, vol 1.

13. By the treaty of cession from France to Spain, of Louisiana, in one thousand seven hundred and sixty-three, although kept secret for political purposes, it is understood that neither the Spanish monarchs or their governors, could take possession of property thus dedicated to public use, and respected by the treaty under pretext of rules or laws, contrary to the treaty. 1 *Martin's History of Louisiana. Treaty of Cession.*

14. Although the kings and city councils of Spain sometimes arrogated to themselves the right of granting, to individuals, permission to establish themselves on public places, it was done in case of some good resulting thereby to the community; and in that case, though the proprietors could not be compelled to remove or demolish the buildings they had erected, if they were valuable, yet they were required to pay a *rent* to the city. *Récopilación de Castilla*, lib. 7, tit. 7, l. 9. *Decree of Louis XIV. April, 1669.*

15. The plaintiffs' counsel contends, that the inhabitants of a city can only hold lands by means of a title; that even immemorial possession cannot supply the defect. This doctrine was laid down by *Guyot*, in *Repertoire de Jurisprudence*, but is overruled by many decisions, a short time before the French revolution. *Collection des Decisions Nouvelles*, vol. 4, &c.

16. The king of France, although absolute before the revolution, forbid the magistrates of his courts of parliament to obey his letters patent or grants, when they made an alienation of his domain. 6 *Nouveau Denisart*, p. 593. *Verbo domaine, &c.*

Eustis, on the same side, contended:

1. That the validity of the patent offered in support of the plaintiffs' title, can be inquired into and adjudged upon

in the present suit. This proposition depends upon such high authority that it may be safely assumed. 11 *Wheaton*, 380, and the other cases there cited. 10 *Johns.* 23. 5 *Binney*, 154.

2. The patent is null and void, because the issuing thereof was without authority, and can have no legal force under the laws, in pursuance of which it purports to have been issued. These laws which were enacted for the final adjustment of land titles, and relate solely to *lands*, and not to *Urban* property or town lots.

3. The provisions in the laws of congress distinguish between public *lands* and *town lots*. The Supreme Court of the United States determined that a grant to enter *lands*, did not include town lots. 12 *Wheaton*, 587. *Land Laws*, 736, 788, 860.

4. The opinion of Mr. Gallatin while at the head of the treasury department, and charged with the administration of the public domain, supports this distinction. He says, in a letter of instructions addressed to the clerk of the land commissioners, dated August 6, 1811—"I consider the decisions on town lots where the title was not complete, as altogether *out of the jurisdiction of the board*, since one of the essential conditions was that of not only *inhabiting* but *cultivating*; an expression intended and applicable only to farms, or country tracts."

5. But supposing plaintiffs' title sufficient to transfer all the rights of the United States to them, what rights had the United States to the premises? By the treaty of cession, Louisiana was transferred to the United States in full sovereignty. And by the admission of Louisiana into the Union, on the footing of the original states, her sovereignty was acknowledged. The United States retained their *property* which belonged to them as property, but all the attributes of sovereignty over the territory, passed to the state of Louisiana.

6. So the right of appropriating public places, the banks of rivers, the shores of the sea, to private purposes, if it exist at all is an *apanage* of sovereignty inseparable from it, and is vested in the state.

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7. Hence I infer the right of appropriating the space on the bank of the river in front of the city of New-Orleans, which includes the *locus in quo*, and which is necessary for the convenience of the port and the safety of the city, being a right of sovereignty merely, and not of property, cannot be exercised by the United States under the constitution.

8. But this space in the front of the city is not vacant land, or part of the public domain. It is shown by the ancient plans of the city exhibited in the evidence, that it was originally set apart as a public place, and denominated a *quai*. These plans being found in their ancient place of deposit, are evidence and authority to show the original destination of this open space as a public place. 1 *Starkie*, 167. *Peake on Evidence*, 129, 130.

9. The spot of ground in controversy is a public place, as a necessary part of the port. A port is public, and is like highways, streets and other public things. *Institutes*, lib. 1, title 1, sec. 1. 3 *Partida*, 28, 6. *Digest*, lib. 1, title 8, art. 9. *Digest*, lib. 43, title 14, art. 1.

10. A port is defined *locus conclusus quo importantur merces et inde exportantur eaque nihilominus statio est conclusa et munita. Inde angiportum dictum est. Digest*, lib. ult. tit. penult. leg. 59.

11. This spot of ground makes a necessary part of the port of New-Orleans, for the lading and unlading of ships, vessels, and of immense quantities of produce and merchandise.

12. It is a public place by destination, being allotted to public use in the original plan of the city. Having been so destined on the original plan of the city as a public place, it can be claimed as such at any time, and is not lost by non-user.

13. The dedication and allotment of a piece of ground to public uses, may be made by parol, by designation on the plan of a town or city. *Beaty et als vs. Kurtz et als*. 6 *Peters*, 256. *City of Cincinnati vs. White's lessee*. 6 *Peters*, 431. 11 *Martin*, 620.

14. All public dedications must be considered with reference to the use for which they are made. Streets, or a public place in a city, require a more enlarged right over the

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use of the soil than may be necessary for a highway in the country. And it is a violation of good faith to the public, and to those who acquired property in reference to the plan of a city, with a view to the enjoyment of the use thus publicly granted, to afterwards appropriate it to private uses. *6 Peters*, 431, 57.

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15. Rivers, ports, public places and levees, and all public places dedicated to public use, belong to all in common. They belong to a class of things that are out of commerce, and cannot be alienated or appropriated to private use, 1 *Domat, Liv. Prel. title 3, sec. 1, 2.* 3 *Partida*, 29, 7. *Ibid*, 28, 6, 9. 5 *Partida*, 5, 15. 3 *Martin*, 296.

16. The open space on which the spot of ground in question is situated, was originally dedicated to the public by the denomination of a *quai*, in the plan of the city, and has continued ever since to be a public place.

A *quai* is defined by the language of the country from whence the name is derived. "On appelle aussi *quai*, un espace réservé sur le rivage d'un port pour la charge et la décharge des marchandizes." *Le Dictionnaire des Arts et des Sciences. Paris, 1731.*

17. This court has already recognized the doctrine, "that public places, such as roads and streets, cannot be appropriated to private uses;" and "if by a stretch of arbitrary power, the preceding government," meaning the Spanish or French monarchs, "had given away such places to individuals, such grants would be declared void." *Mayor et als vs. Metzinger. 3 Martin*, 393.

Mazureau, for the appellees, contended:

1. That the space of ground under consideration, and which the counsel for the corporation and the plan of the city calls a *quai*, is not a *quai*, but is formed by nature, while *quais* are the works of man. That on rivers and in cities, they are levees; in the sea ports the shores of the sea are called *quais*. *Dictionnaire Feraud and De Verger, Verbo quai. Traité de la Police de Paris, 97, 98, 99, 102. Lois de St. Do-*

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minque, 2 vol. 725. 3 *ibid*, 447, 763. 4 *ibid*, 771, 791. 5 *ibid*, 473, 651. 6 *ibid*, 57, 290, 526, 528, 568.

2. In France, no corporation or community of town or city could exist without the king's letters patent. *Maximes du Droit Français*, p. 58. *Règle*, 13.

3. The cities, towns villages, &c. had property or right of use without title. 62 *Guyot's Rep.* p. 455, 456, 457, 459.

4. Possession was never sufficient to acquire commons, or right of use to the inhabitants of a city or town, even when it was incorporated. *Coutume de Paris*, 403. 13 *Guyot's Rep.* p. 309.

5. Under the Spanish government, towns had no property without title. 3 *Part. title* 28, l. 9.

6. In France the king could dispose of the public places or things. *Vattel*, sec. 295, 261.

Maximes du Droit Français, 1 and 2.

The first maxim is, "The king of France holds his kingdom from God and his sword."

The second is—"Se veut le Roi, si veut le loi: as the king wills, so wills the law."

Quæ vult rex fieri sanctæ sunt consonæ legi.

7. The king of Spain could dispose of or alienate even streets, public squares, &c. 3 *Part. title* 32, l. 3.

8. In France *quais* could be built upon; were susceptible of ownership by individuals, and the king could dispose of them as he pleased. 2 *Valin*, 453, 468. *Traité de la Police*, 97, 98, 99.

9. The space in front of the city of New-Orleans, and which is called the *quai*, has ever been considered a part of the king's domain; (*domaine de l'Etat*.) *Vide plan of 1728*. It was so considered under the Western Company; under the government of Spain, and by grants to Lioteau, Metzinger, Magnon, and to the plaintiffs' vendors. *Regulations of Morales*, art. 35, 1799.

10. The plaintiffs in this cause derive their title to the premises from the United States, under the treaty of cession. According to the laws of France, when Louisiana belonged to that nation, and up to the year 1790, all property of every

description which composed the *petites domaines* was alienable. 2 *Denisart*, 120, no. 5.

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Quais made a part of the *petites domaines*. 20 *Rep. Univ.*
78. 3 *Merlin's Rep.* 846. *Verbo domaine public*. The *Domaine Royale*, generally speaking, was inalienable. It could be alienated with a condition that the king should have the right to take it back on reimbursing the price. 2 *Rep. Univ.*
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11. I conclude that according to the Roman and Spanish laws, public squares and streets could be built upon by individuals, if they had a concession to that effect from the king, or from the council to whom it belonged. This is a clear and positive proof that things destined for public uses could be applied to the exclusive use of individuals. When any man does any work, erects any buildings on property belonging to the *fisc*, nobody has a right to prevent it.

12. The United States alone can interfere with our title. They had a right to sell the premises. They alone have the power to contest the validity of our grant. Whether the president had or had not the right to issue our patent, the defendants showing no title, have nothing to do with the property we claim. They have no authority or superintendence over the acts and conduct of the chief magistrate of the Union.

In this case, MARTIN, J. dissenting, the judges delivered their opinions *seriatim*.

MARTIN, J.

The defendants are appellants from a judgment of the court of the first district, by which the plaintiffs have recovered a lot of ground in the city of New-Orleans. Their counsel has, in my opinion, justly called this the most important cause which has ever been presented to the consideration of this court. The tract of land, or slip of ground, on the legal character of which we have to pronounce, and of which the *locus in quo* constitutes a very inconsiderable part, covering the whole space in front of this flourishing city, which

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The counsel of the appellees contends, that the whole of this ground is vacant or waste land, unappropriated, as yet, to any particular use, and liable to be disposed of by the United States, on gratuitous or onerous alienation; the people of this state having, as a condition of an earlier admission into the union, renounced their rights to the vacant or unappropriated lands in Louisiana, in favor of the United States.

The counsel of the appellants have, on the contrary, contended, that this whole space is their property. Secondly, that it is a *locus publicus* dedicated to the quadruple purpose of the pleasure and comfort of the public; the convenience of commerce in lading and unlading; the continuation through the city along the levee, of the highway, (which on the whole island on which the city stands,) runs on the banks of the river; and of a public street along the front row of houses. The counsel has further urged, that if the United States ever had any right or title to the premises, it has never been legally transferred to the appellees.

As, in my opinion, the appellees have shown no legal title, or right of property in the premises, I have not considered the first plea.

The only questions, therefore, which we are called on to solve, relate: First, to the legal character of the premises. Secondly, the validity of the transfer under which the appellees ground their title.

1. On the first point, the appellants offered in evidence: First—A manuscript copy of a plan of the city, subscribed by Dupauger.

2. A like copy of a plan which is now in print and engraved on the large map of the city, lately published by Francis B. Ogden; the date of the original plan is May 15, 1728, and purports to be subscribed by Broutin, an engineer, whose signature is authenticated by several superior officers.

3. A printed copy of the plan of the city, in Charlevoix's history of New France.

The two manuscript copies are admitted to have been on the original plans preserved in an office of the department of colonial affairs, at Versailles, in which plans of towns, fortifications, &c. were deposited.

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The signature of Dupauger is neither proven nor admitted; but his official capacity is admitted. Charlevoix, in his history of New France, informs us there was an engineer of a high grade of that name in Louisiana, who made and showed him a plan of the city. When we compare all these plans with the existing state of the city; the number, width, length and bearing of the streets; the number and size of the squares and lots; the actual *loci publici*, they establish by the *evidentia rei* the correctness of the original plans on which these two copies were made.

There is no difference between these plans and that preserved by Charlevoix, except that the latter has but four front streets parallel to the river, while the former has seven. Hence the counsel for the appellees has contended, that no reliance can safely be placed on the evidence resulting from these plans. He assumes that the date of the latter is in the year 1744; that being the period of the publication of Charlevoix; at least, of the edition produced in court. Whatever be the date of the copy, it is clear the original from which it was taken, appears to be of a date not much less ancient than the two other plans. In Charlevoix's copy, the residence of the Ursuline Nuns, is marked at the north corner of Chartres and Bienville streets; and the new convent appears as an unfinished building at the eastern corner of Condé and Ursuline streets.

The editor of the *Lettres Edifiantes*, has preserved the copy of one from father Petit, the provincial superior of the Jesuits in Louisiana, giving an account of the Natchez massacre, and of the charity and hospitality of the nuns in regard to distressed persons of their sex from that part of the province, who escaped from that disaster; and he says the holy sisters deplored the restraint imposed on their hospitality, by the circumstance of their new house below the city not being, as yet, fit for their reception. The presumption is strong, that this

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did not long continue to be the case, and that the plan of which Charlevoix had a copy, was made before their removal. The circumstance of the latter plan having but four streets parallel to the river, while the former had seven, shows, manifestly, that the one exhibited the *intended*, and the other the actual state of the city.

All these plans, however, agree as to the portion of the city now under our consideration; that fronting the river. In all of them, the space which separates the front of the lots from the levee, or embankment, which protects the city against the overflow of the Mississippi, is designated by the word *quai*, written on the plan, from those objects at places equi-distant. The counsel for the appellants, has argued, that this evidently shows what would otherwise appear from a view or examination of the whole plan, viz: That this space was designated by the founder of the city to be appropriated to the use, not only of the inhabitants of the city, but that of those of other parts of the state, and even strangers: That this designation sufficed to render the spot a *locus publicus*, or public place, to the use of which the public became entitled, without any grant from the sovereign, as the public cannot have a representative capable of accepting the grant.

This principle is shown to have undergone discussion, and received considerable illustration in the Supreme Court of the United States, at its last term, in the case of the *City of Cincinnati vs. White's lessee*, 6 *Peters*.

The defendant, in that case, had succeeded to the rights of the original owner of the land, (on which the city of Cincinnati now stands,) who had made a plan of that city, on which the ground lying between Front-street and the Ohio, was set apart as a common, for the use and benefit of the town. In his said capacity, the defendant claimed a portion of ground included in this space. The Supreme Court held, "that the right of the public to use this space, must rest on the same principles as that of using the streets and highways. That dedications of land for public purposes, had frequently come under the consideration of the court, and the objections

which had generally been raised against their validity, had been the want of a grantee competent to take the title, as well as a grantor to give it. But that was not the light in which the court had considered such dedication to public uses. The law applies to it those rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and to secure to the public the benefit held out and expected to be derived from and enjoyed by the dedication. That there was no particular form or ceremony necessary in the dedication of land to public uses, and that all that was required, was the assent of the owner of the land, and the fact of its being used for the public purpose intended by the appropriation.

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"That all dedications of land to public use, must be considered with regard to the use for which they were made; and streets in a town, or city, may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as regards the right of the original owner to disturb the use, must rest on the same ground in both cases; and applies equally to the dedication of the common as to the streets. It was for the public use, and the convenience and accommodation of the inhabitants of Cincinnati, and doubtless greatly enhanced the value of the private property adjoining the common, and thereby compensated the owners for the land thrown out as public grounds.

"After being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an *estoppel in pais*, which precludes the original owner from revoking such dedication. It would be a violation of good faith to the public, and to those who have acquired private property, with a view to the enjoyment of the use thus publicly granted it."

A similar decision is shown to have been made in the highest Spanish tribunal in Louisiana, in 1798. Gravier had laid out his plantation adjoining New-Orleans, into a

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faubourg, in the plan of which he had designated a spot as a public square, and disposed of several lots accordingly. His heir imagining, that as no deed had been given for this square, it still constituted part of the estate; he, therefore, began to erect buildings on it. His pretensions were opposed, and by a decree which intervened, it was ordered, that the square should be left free for the public use, and that the buildings he had begun to erect should be demolished. See *Mayor et als vs. Gravier*, 11 *Martin*, 625.

The counsel for the appellees, has relied on several propositions. I have examined them most minutely, on account of the impression they appear to have made on the majority of the court.

1. The first is, that the space which the appellants' counsel, and the plans of the city call a quay, is not a quay; but is formed by nature, while quays are works of man. That on rivers, and in cities, they are the levees; in the sea ports, the shores of the sea are called *quays*.

He has referred us to *Feraud's* and *De Verger's Dictionaries*. *Traité de la Police de Paris*, 97, 98, 99, 102. *Lois de St. Dominique*, vol. 2, 725. 3 *ibid*, 447, 763. 4 *ibid*, 771, 791. 5 *idem*, 473, 651. 6 *idem*, 58, 290, 526, 528, 568.

Feraud says, a quay is a levee made between the river, or water of a port, and the houses, for the convenience of the highway, and to guard against the overflow, or high water.

De Verger says, it is a large sloping wall built on piles, and raised along the river, to keep the ground from caving in, and to prevent the overflow. In a city, it is a levee between the river and the houses, for the commodiousness of the highway; the shores of a sea port which serve for lading and un-lading merchandise.

In the *Traité de la Police de Paris*, at the places to which reference is made, I have not been able to find anything tending to the elucidation of this proposition. I have, however, considered all the quotations in the examination of the ninth proposition.

In the laws of *St. Dominique*, vol. 2, is an ordinance, authorising an individual to make before his house a *quay* and a

chaussée, leaving before the house a vacant space of one hundred and fifty feet; guarding the *chaussée* by a double row of picquets.

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In volume 3, page 477, I find nothing but an ordinance directing a quay to be kept clear and unincumbered. In the same volume, page 675, a quay is directed to be built ninety feet in width. In volume 4, page 771, another quay is ordered to be built one hundred and twenty feet in width. In page 791, of the same volume, the importance of a quay for the city of Port-au-Prince, is spoken of. It is to be spacious and commodious for the use and comfort of the public; and is to be filled up and levelled. In volume 5, page 473, a quay for the city of the Cape, is projected for the comfort of the city, and the convenience of commerce. A space is to be left before the houses for military evolutions. In the same volume, page 661, a quay for another city is mentioned. It is said a wide space is indispensable between the houses and the river; as the want of it may, in the case of conflagration, facilitate the spreading of the flames.

I find nothing in the sixth volume that throws any light on this part of the case, except a permission granted by one of the governors of St. Domingo, *par grace* out of commiseration, to erect on the quay a frame building thirty or forty feet square, under the charge of demolishing it on the first order, without claim to any indemnification. *Ibid*, 528.

I have risen from the examination of these authorities, cited in support of the proposition, with the impression, that they do not establish it, but rather the converse. I entered on the examination with the supposition, that the word quay, is particularly applicable to that part of a port (on the sea or a river,) which is used for the reception of merchandise imported, or to be exported; and this impression has neither been effaced or weakened.

In the *Dictionnaire de Trevoux*, we have the following definition of the word quay. In marine phrase, it is a space on the shore of a port for the loading and unloading of goods; *agger ad ripam*.

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In the *Dictionnaire de l'Académie*, edition of 1798, it is said, we call a quay a shore of a sea port, which serves for the lading and unlading of merchandise. There is in ports an officer called *maitré du quai*, who has charge of the police of the port.

Boiste, in his *Dictionnaire*, edition of 1829, defines a port to be a place for the reception of vessels, in which they are protected from storms. He understands also, by the same word, a place on the shore of the sea, or on the bank of a river, where they unload merchandise. Thus far Lexicographers. But courts of justice are warned by law not to adhere to the strict grammatical sense of words, but seek their popular sense. In the first quotation from the laws of St. Dominique, a *chaussée* and a *quai*, are spoken of as two distinct objects; the former meaning the one immediately on the water, against the attrition of which, it is to be protected by a double row of picquets. The quay, by which I understand the place destined for the reception of merchandise, is to be between the *chaussée* and the open space of one hundred and fifty feet, which is to be left open between it and the first row of houses. I take *levee* and *chaussée* to be synonymous terms.

Chaussée, a levee of earth, which is made along the stream to retain the water of a river or pond. A levee, which is made in low, wet and swampy places to serve as a road or way: to make a *chaussée* in a swamp. *Dictionnaire de l'Académie Française*.

Levee, a mass of earth or masonry raised above the ground to form a road and retain the water. *Idem*.

The word *quay*, like many others, has several significations. In a strict sense it may be confined to a sloping wall. In another to the part of the port destined to the reception of merchandise. In a more enlarged sense it designates the whole space which separates the first row of houses of a city from the sea or river. It is in this last sense that *Malte Brun* applies it to the quay of St. Petersburg; the quay which separates the emperor's winter palace from the river.

"The granite quay in front of the emperor's winter palace, separating it from the river, and forming part of the magni-

ficent one which I have elsewhere described, and which extends along the southern bank, is wider here than in any other place I have seen. *Edinburgh Review*, p. 412. Notice of works published by Wells & Lilly, Boston, particularly of Malte Brun's geography.

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It is in the same sense that the word *quay* is used in our *Civil Code*, 449. "Common property, to the use of which all the inhabitants of a city, and even strangers are entitled in common; such as the streets, the public walks, *places publiques*, and the *quais*."

It is evidently in that sense that Dupauger, in his plan, applies it to the space which separates the first row of houses from the levee, although that space was intended to include a street along the houses; a place destined to the landing of merchandise, and a continuation of the highway or royal road along the Mississippi; giving to the whole the appellation of the most prominent part, to wit: a place for the reception of merchandise.

During the discussion, an argument was attempted to be drawn against the conclusion I have adopted, from the very great extent of this vacant space. The city of New-Orleans stands on a place before which the Mississippi makes a very great curve; the base being that of the first lots, was drawn at a distance of about one hundred and thirty feet from the river in the middle of the city, and of about three hundred feet at the extremities above and below. In the middle, the space was barely sufficient for the purposes above specified; especially if we compare it with the space directed to be left vacant in cities on the island of St. Domingo; certainly not to be compared with New-Orleans as to the importance which their destination attaches to them.

The city forms a parallelogram; all the sides of which, with the exception of that towards the water, were completely closed by fortifications; the streets parallel to the river had no issue, but were stopped by the fortifications on each side. Those which are perpendicular were equally closed by fortifications in the rear, (except one of them which had a gate leading to the bayou road;) the only other issue or outlet,

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was on the space, the nature of which we are considering. So that a grant of the whole of that space to an individual or individuals, would obstruct every avenue to the city, save the small gate-way in the rear; thus making New-Orleans a large penitentiary. The streets were very narrow, being but forty feet wide, leaving the city with but a single square—the *place d'armes*, or *campus martius*, the property of the sovereign, the two sides of which were covered with barrels, besides a very small square between the cathedral church and Royal-street, which has lately been widened at the expense of the city, and to which, in remembrance of a late venerated pastor, the name of Father Antoine's square has been given. So that the city is without any space but the streets for air, promenade, or the reception of goods or furniture in case of a conflagration, except this *quai*, or open space fronting to the river.

Moreau Lislet, a witness examined in the cause says: "That in all cities or towns situated on the sea shore, or the banks of navigable rivers, a vacant space between the sea shore, or the banks of the river, and the first line of houses, front to the sea shore or the river. That this space is of a certain extent in width, greater or less, according to the importance of the place, or of its commerce. That in Paris the quays are very extensive; and in Bordeaux the quays are nearly of the same extent in width which exists between the river Mississippi and the front of the cathedral church, in New-Orleans. That at Cape Français and Port-au-Prince, in the island of Hispaniola, the quays were from sixty to one hundred and twenty French feet from the sea shore to the first line of houses. That generally, the quays in all their extent were left for the public use; but that it was sometimes permitted, or suffered by the king's government, or by the municipal authorities of the place, to erect some buildings, either for public utility or commerce, or ornament of the city or port; such as market houses, fountains, coffee houses and public baths."

In the city of Natchez, a much larger space was left vacant between the houses and the river, than in New-Orleans.

The former city being without any authentic plan, or evidence that this place had ever been dedicated to public purposes, the justice of congress came to its aid. By act passed April 21, 1806, the United States ceded all their right to the land lying between the front street of the city of Natchez and the Mississippi river, and forever vested it in the corporation of the city, so as not to affect the legal or equitable claims of individuals, and directed that the said land be neither cultivated, nor occupied by buildings, but that it be planted with trees, and preserved as a common, for the use, comfort and health of the inhabitants of the said city, and all persons who may occasionally resort thither." See *Ingersoll's Digest*. This is clearly making it a *locus publicus*.

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When I compare the space that Dupauger calls a quay, with Malte Brun's description of St. Petersburg, with that which Moreau Lislet has given of the quays in Paris and Bordeaux, Cape Français and Port-au-Prince, with the ideas that my mind has received from the examination of the laws of St. Domingo, cited by the appellees, I cannot resist the conclusion, that Dupauger meant by his plan, to convey the idea of a dedication to public uses, of the whole space under consideration. He appears to have considered the levee and quay, as distinct objects, as they are in the laws of St. Domingo, for he writes the word *quai*, twice, at equal distances from the levee and the houses.

A plan, like a literal document, may on a first view present ambiguous ideas. In such cases the lines of the one, and the words of the other, are susceptible of construction and interpretation, according to settled rules, the principal of which is, that every part of each should have some effect, and none absolutely rejected. In the plan before us, the word *quai* is twice written; evidence of the destination given to a space of ground. If the word had not been used, it appears to me the space being an open one in front of the city, to which every street perpendicular to the river leads, the plan would still present the same evidence.

As the appellees claim under the United States, who have succeeded to the rights of Spain and France, they must be

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estopped by the word quay, used by the officer whom the government of France employed to make the plan.

If the appellees are not *estopped* by the word quay, it appears to me all the streets in the city, being perpendicular to the levee leading to this space, and a spot being marked by the plan, upon and over the levee opposite to each street, the conviction is irresistible, that the founder of the city intended that space under consideration, to constitute a part of the city and connect it with the river. It has been said that this conclusion may exist by a prolongation of these streets, over that space to the river, and their intersection by the highway along the river and a street parallel to it along the first houses, will leave angular squares at the disposal of the United States. To this I answer, that this court is bound to support the dedication to the extent to which it was made, not to that degree which we might deem sufficient. We sit here to carry agreements into effect, as they appear to have been made, and not to make them. If any part of the space was dedicated to the use of the public, the whole was, and no part can be pointed out as excepted from the dedication.

2, 3, 4 and 5. The next four propositions are, that in France no corporation or community of town or city, could exist without the king's letters patent.

The cities, towns or villages, had no property or right of use, without title.

Possession was insufficient to acquire commons or right of use to the inhabitants of a city or town, even when it was incorporated.

Under the Spanish government, towns had no property without title.

It has appeared to me, that neither of these propositions has any bearing on the present case, as I consider the right claimed to resist encroachments on a public place as a right not particular to the inhabitants of the city as such; nor on any property exclusively their own, but on a public place, to the enjoyment of which they are entitled, not exclusively, but in common with the inhabitants of any part of the state, or even strangers.

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In this part of the case, it is all important not to confound public places, and such places as belong expressly to a city or town; the first are destined to public and general use, from which no one is excluded. A citizen or inhabitant of any city, town or parish, and even a stranger or alien, has an equal right to the use of a street, square, the quay or port of the city; to the use of part of the sea, or river on which the city or town stands, with any one that dwells or owns property therein. The right to use results from the dedication, not from any supposed necessity which is presumed to exist, that owners of lots should use the streets to reach their dwellings. If that were the case, the streets would be burdened with a servitude, in the nature of a right of way or passage; then the use of the streets would be confined to owners of creditor estates; for such is the nature of a servitude. But streets and public squares, as the Supreme Court of the United States has said, are public places free for the use of all.

The places of which a city or town has the exclusive property, and with which it may prevent any interference, by other than its inhabitants, are those which it holds by letters patent, grants, purchase, exchange, or donations, or those on which the inhabitants have a right of use. Of the first kind, are the lots on which town houses, jails and other buildings of this kind are erected, or to be erected; grounds on which the inhabitants have the right to pasture their cattle, to cut wood, dig for turf and the like. It is of this kind of places, that the law says that the city or town cannot claim thereon, any use without letters patent, or a grant, or deed. In the absence of such a document, the public, *i. e.* inhabitants of the cities, towns, parishes, even strangers cannot be prevented from using places within or near a town or city, to which the inhabitants of the city or town may pretend they have an exclusive right.

Of public places, the public may claim the use, by exhibiting evidence of a dedication to its profit, by the sovereign or *pater familias*, without any letters patent, grant or deed.

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Of places which are alleged to be the exclusive property of the town or city, or of which the exclusive right to use is claimed, letters patent, a grant or deed, must be produced; and it is of these, and these alone, that the authorities relied on by the counsel of the appellees, speak.

6. The sixth proposition is, that in France the king could dispose of the public places. The authorities relied on in support of this, are *Maxims du Droit Français*, 1 and 2. *Vattel* sec. 261.

The first maxim is, that the king of France holds his kingdom from God and his sword.

The second *si veut le roi, si veut le loi*: As the king will, so wills the law. *Quæ vult rex fieri sanctæ sunt consona legi*.

Neither of these maxims sheds any light on the point under consideration. They only show that the king possesses the legislative power.

The section in Vattel, is as follows: "The nation having the free disposal of all the property belonging to it, (sec. 25) it may convey this right to the sovereign, and consequently confer upon him that of alienating and mortgaging the public property. But this right not being necessary to the conductor of the state, to enable him to render the people happy by his government, it has not made an express law for the purpose; it ought to be maintained, that the prince is not invested with it."

The preceding section may throw some light on the one now under consideration. It is as follows:

"SECTION 260. The prince or superior of the society, whatever he is, being naturally no more than an administrator, and not the proprietor of the state, his authority as sovereign, or the head of the nation, does not of itself give him a right to alienate or dispose of the public property. The general rule is, that the superior cannot dispose of the public property as to its substance. If the superior transfers public property, the alienation will be invalid, and may at any time be revoked by his successor, or by the nation. This is the law commonly received in France, and it was upon this principle that the duke of Sully advised Henry IV.

to resume the possession of the domain of the crown, alienated by his predecessors."

I have been at a loss to discover how the counsel of the appellees expected us to apply his quotations to the support of his proposition. They seem to show that the king of France could not sell the domain of the crown. But we are inquiring as to his power to sell *public places*. As to them, the authorities now placed before us afford no light. Those I have had recourse to, establish the converse of the proposition. They show such places are inalienable, and out of commerce of individuals.

Domat says, rivers, their banks, highways, are public places, which are for the use of all, according to the laws of the country. They belong to no individual, and are out of commerce; the king only regulates the use of them.

We class among public places, as out of commerce, those which are for the use of the inhabitants of a city, or other place, and in which no individual can have any right of property, as the walls, ditches or gates of a city and public squares. *Domat*, vol. 2, lib. 1, tit. 8, sec. 2, 3 and 16.

This author names, as not included in the domain of the king, public places, as highways, squares, and the like, which are out of the commerce of individuals, and devoted to the use of the public. For they produce no revenue, and are not reckoned among objects of property; and the rights which the public and the sovereign have therein, are of another nature than those which property gives.

As it is not alleged that the king of France alienated any part of the space under consideration, I have been unable to discover the bearing of this proposition.

The Spanish laws having been substituted to those of France, by O'Reilly, the Spanish monarch's conduct in regard to public places, must be regulated by the latter and not the former. A desire, however, that nothing to which the counsel appears to attach any importance, should remain unnoticed, has led me to the examination of this proposition.

7. The seventh proposition is, that the king of Spain might dispose of streets and public places.

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In support of this proposition, we are referred to *Partida 3, tit. 32, law 3*, which is in the following words: "If a man begin to erect a new edifice in the public places or streets, or common threshing grounds of any place, without the permission of the king, or the council upon whose ground he builds it, then any one of the inhabitants may forbid him to continue the work, &c."

The counsel appears to assume, that the power allowing the erection of a building, includes the right of alienating the ground. This is certainly a *non sequitur*. We have seen that public places are inalienable, even by the sovereign, although he has the authority to regulate the use of them; and that this regulation is sometimes effected by grant and permission to erect buildings for the utility or ornament of the city.

The counsel for the appellants has drawn our attention to the gloss on the *Partida*, cited, which states that the permission cannot be granted, either by the king or the council, unless the building be for the ornament of the city. But if the quotation of the counsel for the appellees does not support his pretension, the counsel for the appellants has furnished us one which establishes the converse. It is found in *Partida 5, 5, 15*, which says, "a public place, as squares, roads, threshing grounds, rivers, and other waters, which belong to the king or the commons of a city, cannot be sold or alienated."

8. The eighth position is, that in France, quays could not be built upon, were susceptible of ownership by individuals, and the king could dispose of them as he pleased.

The authorities cited in support of it, are 2 *Valin* 453, 468. *Traité de la Police de Paris*, 88, 97, 98 and 99. *Valin* has published an ordinance regulating the duties of the *Maitre du quai* of Dunkirk. This officer is directed on his evening round, to cause to be shut up *les petites maisonnettes*, which are on the quays, for the sale of brandy and other articles, so that no body may shelter himself there at night, and to prevent new ones from being built without permission.

By an ordinance of La Rochelle, which *Valin* has given, it is enjoined on keepers of *hotels* and *cabarets*, vendors of

tobacco, cider, beer and brandy, having houses on the quays, to shut them at night; they are forbidden to receive or permit any one to go out before daylight in the morning.

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In page 98, of the *Traité de la Police de Paris*, it is said, Louis the Young, by his letters patent in the year one thousand one hundred and forty-five, granted to the inhabitants of *Grevé* and *Monreau St. Gervais*, in consideration of the sum of seventy livres, the grand square, one of the ancient markets of Paris, to be forever free of any buildings of the king, or other incumbrances.

The author adduces these letters patent, as a circumstance to establish the fact, that as early as that king's reign, the faubourg St. Denis was built, and *Grevé* square was a public place, and an ancient market.

The counsel for the appellants has urged, that these letters patent establish only that the king undertook for a given sum, to clear the square of a building which he had thereon.

In pages 97, 98 and 99, the counsel for the appellees shows that the king ordered buildings to be erected on the quays of the island of the palace, and those of Notre-Dame, the quay Malaquêts and the Arsenal.

The first island derives its name from the *Palais du Tournelles*, which the kings had on it. This palace was in part demolished under Charles IX., the brother of Henry III., who preceded Henry IV. on the throne of France. The author informs us, that in the beginning of this monarch's reign, this island was covered with meadows; that the king had it drained, a magnificent square and elegant streets laid out, and he covered its quays with houses. As the island was the property of the crown, his doing so was certainly no interference with any public place. See pages 97, 98.

By his order similar improvements were made on the other island, which was the property of the chapter of the cathedral of Paris. But we are informed he appointed commissioners to purchase the property of the island from the chapter, to whom a compensation was made therefor. See page 99.

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The same observations that were made as to the island du Palais, apply to the island Notre-Dame, after the latter became the king's property by purchase.

The quay Malaquêts was also built upon. If that quay was a public place in the city of Paris, the king regulated its use by granting permission to erect houses on some part of it, and the convenience (if any) was compensated by a rent paid to the city. As to the quay of the Arsenal, the author informs us that it was built in one thousand six hundred and four, and that several noblemen made their residence there; this, in my opinion, establishes the period at which buildings were extended to that part of the city. We should understand by being told that a particular street was built upon, that the houses were built *not on it*, but *along it*.

The ordinance of the marine directs the wharfinger when he makes his evening tour, to cause to be shut *les petites maisonnettes*, the very small houses which are on the *quay* and *dykes*, in which refreshments and spirits are sold, and that none may retire in them at night, nor to suffer any new houses to be erected without permission.

This ordinance is relied on by the appellees' counsel to prove that quays are susceptible of private ownership, since they may be built upon. My mind has, from the reading of the ordinance, received the impression that it establishes the converse of the proposition. The small houses in which spirits and refreshments were sold, I take to be booths, sheds, &c., not designed for the habitation of man, but for the sale of refreshments, as the wharfinger must see that they be closed at night so that no one (which includes the owner,) may hide himself within them. He is to take care that no such house be built without permission. This implies that the soil is not susceptible of private ownership, for if it was, it could be built upon by the owner without permission.

A quay, like any other public place, is not susceptible of ownership by individuals. But on it, as we have seen, and as is the case with all other public places, certain buildings may be erected for ornament or public utility, without the permission of the prince who regulates the use of them, or

of those to whom he delegates or confides this part of his authority. If the quays be at such a distance from the houses in the city, to which sailors and people working on them may conveniently resort for refreshment, it is the province of him who regulates the use of the quays as public places, to determine whether some small portion of ground may not conveniently be set apart on which small buildings may be erected temporarily for that purpose, in such a manner that the public may be better accommodated by the appropriation of the ground covered by such very small houses for a place of refreshment, than by being left open.

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The counsel for the appellees has next drawn our attention to an injunction in the ordinance to keepers of hotels, cabarets, and sellers of tobacco and spirits, having houses on the quays, to shut them at night, and forbidding them to receive, or suffer any one to go out therefrom during the night. *Art. 15, p. 268.*

This part of the ordinance does not establish that there is any hotel or cabaret on the quay; but that there are keepers of these houses who have been permitted to occupy them on the quay in the manner just considered and spoken of. The idea of hotels being built not *along* the quay, but *upon* the very quay itself, is as absurd as that of a hotel keeper who is forbidden to receive travellers or boarders after sundown, or to suffer any one of his own servants to go out before sunrise.

The counsel for the appellees, with the view to establish that quays form part of the *petit domaine*, which the king may alienate, has drawn our attention to an edict of 1708, in which he conceives quays are included as constituting a part of that domain. The words of the edict are, "*les droits sur les rivières navigables bien fonds, lits, bords, quais,*" &c., literally meaning the *right to duties* on navigable rivers, their beds, banks, quays, &c.

The edict, according to my understanding, points out as objects constituting part of the *petit domaine*, the *right of duties* which the king claims on a navigable river; its bottom, bed and banks, or in a quay; not the *substance* of the river or the quay. O'Reilly transferred to the city the right of

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claiming an anchorage duty on vessels lying in the Mississippi before New-Orleans, but not the river itself.

The right of demanding *quayage* or wharfage on vessels lying along the quay, or on merchandise landed and lodged on the quay, is a right which may be the object of a sale without the quay itself being sold.

The ownership of quays in La Rochelle has been attempted to be established by the testimony of Mazureau. This gentleman, who is a native of that city, says, the quays belonged to individuals. They are allowed to receive and did receive *droits du quaiage*, i. e. wharfage duties from all vessels making fast to the quays.

In an ordinance of the judge of the admiralty of La Rochelle, owners of quays *propriétaires des quais* are spoken of as well as in Valin's notes thereon. Notwithstanding all this, my researches have led me to the conclusion, that quays in that city are public places, *hors du commerce*, and not susceptible of ownership by individuals; but that the king ceded his wharfage duties, which *Merlin* informs us, are alienable to certain individuals, on the condition that they keep the quays in repair. I think it is of these owners of wharfage duties that the witness, the judge of the admiralty, and Valin, mean to speak under the appellation of proprietors of quays.

I have been led to this conclusion by the fact, that owners of quays are not known to the law, but owners of wharfage duties are; and on the following considerations.

The ordinance Valin comments upon, mentions that quays are to be kept in repair by the municipal authorities. *Article 20.* That in ports in which individuals are appointed to receive wharfage duties, *they* and not the municipality are to keep the quays in repair. *Art. 21. 2 Valin, 475.*

Valin never speaks of the obligation of owners of quays to keep them in repair, nor of their right to claim wharfage. Indeed the obligation cannot be well supposed to exist; for ownership consists in the right of *utendi et abutendi*, and of putting a price at pleasure on the use of it by others. Valin

tells us, that in the port of La Rochelle, the wharfage duties belong to those who keep the quays in repair. *Ibid*, 473.

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The ordinance of the judge who uses the expression of *owners of quays*, purports to be made for preventing extortion in the collection of wharfage duty. And Valin uses the same expression in examining the consequences to those people of their neglect in keeping the quays in repair. The consequence is, the suspension of the right to receive wharfage duties by the *owners of quays*, until they amount to a sum sufficient to pay for the repairs. He examines what is to be done if the quays are suffered to be much out of repair, so that the replacing them in the situation to be used, exceed in value the duties that may be collected during one or more years; and he concludes that proceedings must be instituted to have them condemned, to effect the repairs under penalty of the forfeiture of the right to the wharfage duty in favor of the municipality, on whom the obligation then devolves of keeping the wharves in repair.

These individuals have not the absolute property of the quays, but a qualified one; *i. e.* the right of receiving wharfage duty as a compensation for their care and expense in keeping the quays in repair, having been substituted to the rights of the sovereign, who in undertaking to keep a public place in repair, has regulated the use of it in such a manner as to subject those who avail themselves of the quays, to contribute to their repair.

I consider quays as part of a port. Every dictionary states, that in sea ports the quay is the place where merchandise is landed. Some state it is the same in ports on a river. We have seen the police of quays in France belongs to the admiralty; the only good reason for this is, that the jurisdiction of the admiralty extends over ports; and of these the quays are a part.

A port consists, not only of the land covered with water on which vessels ride at anchor, but also of dry land, on which merchandises are landed and brought to be shipped. *Mare publicum est, flumina et portus publici sunt.*

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The sea, the rivers and ports, are public; if there be not some place out of the sea or river which is the port or part of the port, wherefore are we told that the sea, rivers and ports are public? If the port be included in the sea or river, why, after being told that the whole, *i. e.* the sea and river are public, do they tell us that the port, a part of these, is so?

9. The ninth proposition is, that the space called the *quay* has ever been considered a part of the king's domain.

In this part of the case we have been referred to grants of land on that space by governor Miro, to Magnon and Metzinger; by governor Carondelet, to Loiteau, and to the land regulations published by the intendant in 1799.

But two of these grounds have been brought under the consideration of this court; that to Metzinger, and the one to Loiteau.

In the first, the present appellants failed in the proof of their principal allegation, viz: That the *locus in quo* was part of a public highway. But this court, of which I had not then the honor of being a member, fully recognized the inalienability of public places, as was contended for by the appellants. There was not then in the state any copy of the plan of New-Orleans, and the now appellants were unable to establish their case. The court, however, declared, "that public places, such as roads and streets, cannot be appropriated to private use; that this was one of those principles of public law which required not the support of much argument; that there was not any doubt, that if by a stretch of arbitrary power the preceding government had given away such places to individuals, such grants might be declared void." 3 *Martin*, 296, 303.

In Lioteau's case, the then plaintiffs labored under the inability to establish the appropriation to the public use by the founder of the city of New-Orleans, of the space which separates the first row of houses from the Mississippi. See the case of *Chabot vs. Blanc*, 5 *Martin*.

The appellants stated their ability to establish, that immediately after the grant murmurs had been excited, and the inalienability of any part of the space having been tena-

ciously insisted on, the governor had revoked his grant and indemnified the grantee, by the concession of a lot on one of the streets; but the court decided the testimony was inadmissible, and the witnesses were not heard.

Magnon was a ship builder, and the ship yard was between the levee and the water. The governor deeming the builder's residence near it necessary to the public service, allotted him a space of ground to live on near the yard, but on the opposite side of the levee. The question arising out of this grant was not litigated; the city agreeing to compensate Magnon for the relinquishment of his claim.

In 1799, the disposition of the public lands in Louisiana, was confided to the intendant. Morales, the then incumbent, made certain regulations; by one of which he required the claimants of lots before the city to apply for the perfection of their titles. This renewed the murmurs and excitement which the grants of the former governor had created. The matter was brought before the cabildo, on the remonstrance of the attorney-general syndic. That body was then presided by the only jurisconsult in the province, Don Nicholas Maria Vidal, auditor of war and lieutenant governor, the vacancy in the office of governor by the death of governor Gayoso, not having as yet being filled. This tribunal directed the attorney-general syndic to institute legal proceedings to prevent any title or grant being given for any part of the land between the city and the river. The intendant was no legal character, the assessor of the intendancy, his official adviser, had lately died, and no successor had as yet been appointed. These circumstances induced him to decline acting then on the attorney-general syndic's application. The cabildo addressed the king on this subject, but the retro-cession of Louisiana to France happening soon after, the matter was never acted upon by the sovereign, or any of his officers in the province.

It is not pretended that any act of the French government while France possessed Louisiana, nor of the Spanish under O'Reilly and Unzaga, shows that the space of ground, the character of which is the subject of inquiry, was considered a part of the king's domain.

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During that period, however, the meat, fish and vegetable markets were removed from Condé-street to the space under consideration, under a provision of one of the laws of la *Récompilación de Leyes de las Indias*, which requires all markets to be placed in cities and towns, on the sea or a river, between the houses and the water, a measure resorted to for insuring cleanliness. This was an act regulating the use of a public place, and it contributed to the profits of the city, by whom the space covered by the old markets was converted into a ball room, and continued so till very lately, when it was sold.

The levee running between the highway and the river, was a great thoroughfare, and of much resort. Sailors spread on it, especially on Sundays, their small adventures; pedlars displayed on tables and under moveable shelters a variety of wares. Galvez, about the year 1798-9, conceived the idea of relieving the latter from the daily trouble of removing their wares, tables and shelters, by permitting huts and cabins to be erected along the levee, on the ground where the highway or royal road ran, on condition that those who availed themselves of this permission should pay therefor an annual rent, the produce of which was given to the nuns for the education and support of a number of indigent or orphan girls of the city. This was certainly the legitimate exercise of the authority of regulating the use of a *public place*. In 1788, a tremendous conflagration having almost reduced the city to ashes, some of the poorer classes of inhabitants being left without houses or shelter, Miro, their governor, allowed a number of them to build cabins or huts near those of the pedlars. The ancestor of the vendors of the appellees was one of them.

Gayoso permitted similar buildings to be erected, requiring those who raised them to pay a certain rent, the proceeds of which he applied to the payment of the wages of the door-keeper of the cabildo.

Of those who availed themselves of Galvez, Miro and Gayoso's permission, it does not appear that a single one, except the vendor of the appellees, ever considered the permission he obtained as entitling him to a claim to the ground

on which he built. They viewed their licenses as temporary ones, and when disinclined to pay rent they removed their light edifices, and cleared the ground which they temporarily occupied.

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10. The tenth, and last proposition is, that the appellees derive their title to the premises from the United States, under the treaty of cession.

By the second article of that treaty, "all public lots and squares, &c." are included in the cession. Public squares are thereby nominatively included among the things sold; hence the appellees' counsel concludes they were the legal objects of sale and alienation. This, in my opinion, does not follow.

The *fifth* Partida, 5. 15. tells us that "a free man, a thing religious, sacred or holy, a *public place*, as squares in a city, &c. cannot be sold or alienated, but says there are cases in which they may; "as, where a village, or any other place, is sold with all its dependencies." "For though the church in the village could not be separately sold, yet by selling the village, it would pass with all other things," and the sale would be valid. But, I understand, that the new proprietor of the village would have no more right to the church, or any thing belonging thereto. That the church would pass *cum onere*. It would continue to be a place sacred, religious and holy, *hors de commerce*, inalienable as it was in the hands of the former owner or proprietor. Thus, highways, streets, squares, ports, and other public places in Louisiana, passed by the retro-cession to France, and by her sale, to the United States, because the property of the former, as component parts of the province. Yet their legal character was not changed, and they remained, in the hands of the new owner, public things, *hors de commerce*, inalienable as they were before the sale and transfer; the transferee acquiring no other right thereon than that which the transferor possessed, *i. e.* that of regulating the use.

The other observations of the counsel of the appellees, on this proposition, relate to the validity of the transfer of the premises by the United States to the vendors of the appellees,

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which forms the second branch of my inquiry, to be considered hereafter.

Upon the whole, it appears to me, that the appellees' counsel has failed to establish any of the propositions he relied on, which have any bearing on this case, viz :

1. That the space marked on the plan as separating the first row of houses in the city, is not a quay.
2. That the king of Spain could alienate public places.
3. That in France, quays were susceptible of ownership by individuals; and the king could dispose of them as he thought fit.
4. That under the Spanish government, the space between the houses and the river in this city, was considered part of the royal domain:—Or, that the treaty of cession supports the appellees' claim.

I therefore conclude that the decision of this part of the case, must be governed by that of the Supreme Court of the United States, in the case of the *City of Cincinnati vs. White's lessee. 6 Peters*, to which the appellants' counsel has referred us.

The applicability of that decision to this case, has, however, been contested, on the ground that, although it affords evidence of the principles on which it was determined being consonant to the common law of England, they cannot be received as evidence of this conformity to our law. I have looked in vain in the opinion of the court, for a reference or allusion to any principle peculiar to the common law of England. It has appeared to me that the case was determined on the first broad and general principles of law mentioned in the *Corpus juris civilis*, viz: *Honeste vivere*, "to act honestly;" from which is deduced the maxim of *polliciti servare fidem*—"when we have made a promise, to keep it;" and the necessary corollary *turpe est fidem fallere*—"it is shameful to disappoint expectations we have authorised."

But the consonance of the decision with the laws of Spain, is manifest by its conformity to that of the highest judicial tribunal in Louisiana, declared two years before the retrocession to France.

A farther distinction has been attempted to be made between the case in Peters, and the present. In the one, the plan of the city of Cincinnati had been made by an individual; in the other, the plan of New-Orleans was made by the sovereign, who, it is said, always retains the power and authority of regulating the use of public places, must at all times retain that of re-modelling his plan of a city, provided he does not interfere with the rights of individuals, nor those which he has sanctioned by a charter or letters patent. This is not denied, in cases of a regulation of the use of public things. But a destruction of the right, and a regulation of the use of it, are very different things; and the former cannot be justified under the pretence of the latter, where the act has none of the characteristics of one tending to regulate, and its object is evidently the destruction of the right.

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That the Spanish governor was not considered, in Louisiana, to possess the power of alienating public places, appears to have been the opinion of the cabildos, of Vidal the auditor of war, and the officer whom the king of Spain had chosen to furnish his governor with legal advice; and we have seen this opinion was declared to be that of this court in Metzinger's case.

There is so little affinity between the regulation of the use which the public is entitled to make of a public place, and the absolute and gratuitous destruction of the right of using it, that I cannot well comprehend how the authority or right to destroy, is a consequence of that to regulate. Why have the Spanish monarchs announced in the Partidas, that they cannot sell or alienate a street, or public place or square, if the mere alienation by them, has the effect of an instantaneous abolition of the legal character of such places, in order to create *ipso facto* a removal of the place from the class of those which are inalienable, in order to prevent the legal prohibition from presenting an obstacle to the gratification of the sovereign caprice?

I do not wish to be understood to say, that natural or other events may not render a public place no longer susceptible

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of the use to which it was dedicated; nor that, when this is the case, it does not lose the legal character which the dedication and consequent use had given it. Aigues-Mortes, a town of France, remarkable as that from which St. Louis sailed, with a large army, for the holy land, during the wars of the crusades, is now at the distance of a league from the sea. Its port and quays cannot be used for the purposes to which they were once destined, and have necessarily lost the legal character, which their destination and consequent use had given them. This has been the effect of a natural event. The town of Bath, on Tar river, in North Carolina, was erected by the legislative authority, very early in the last century; towards the middle of which it had risen to some importance, and the colonial legislature sat there. The great width of the river before it, rendered the anchorage unsafe; other circumstances combined to induce the inhabitants to remove higher up on the river, to a spot which, during the last war, became the town of Washington, the establishment of which was sanctioned by the legislature, who ordered the public buildings of the county to be built, and its court to sit there. Before the end of the century, a conflagration destroyed almost every building remaining in Bath, and soon after, the act under which the town had been established, was repealed; the heirs of the man on whose land the town had been laid off, having re-purchased all the lots. Thus, by another than a natural event, the port, quays, streets and public squares of Bath, shared the fate of the port and quays of Aigues-Mortes, *i. e.* they lost the legal character they had by their destination to public use, their consequent inalienability, and resumed their primitive susceptibility of ownership by individuals. I mean to say, that the liability of a public place, to such or a similar change, is not inconsistent with the legal character which its dedication and consequent use imprinted on it, nor the inability of the sovereign to destroy that character *ad nutum*.

In the present part of my opinion, I think it might, however, be conceded, that the authority to alienate may be deduced as a corollary, from that to regulate; because it appears to

me, in this case, there was no alienation of the premises by a sovereign authorised to regulate the use of the public place.

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Miro, in yielding to the solicitation of an indigent individual, who desired to be permitted to build himself a small cabin, in which he might keep from the weather the few clothes the late conflagration had spared, did not imagine he was alienating any part of the public places ! If he meant to do so, we have the declaration of this court, that it would not require much argument to convince them that they should disregard the grant of a Spanish governor, of a part of a public place. When, about four or five years afterwards, the few planks which had been nailed together, and constituted his *pequeña cabána*, had rotted, and Bertrand found it necessary to rebuild it, he did not conceive himself authorised to do so by the permission he had first obtained to build, without having this permission renewed: and the governor was so conscious of his authority to refuse his consent to a renewal, that he burdened it with the condition that the new work should not extend beyond the limits of the former. Why this caution, if the former permission was an alienation of the soil?

If the first permission was not an alienation, there is no reason to say the second was.

In one thousand eight hundred and twelve, the second house or cabin, had fallen to ruin. The materials were carried away, and this spot of ground left clear.

In that year the Territory of Orleans was erected into a member of the confederacy of the United States; and the new state became the sovereign, on whom devolved the authority to regulate the manner in which the use of public places was to be governed. It is useless to argue whether, until then, the territorial government, or that of the United States, possessed this regulating power, as no use of it was made by either of them.

If the law be as declared by the Supreme Court of the United States, in the *Cincinnati case*; and of the Spanish tribunal in the case of the *Mayor, &c. vs. Gravier*, in relation to the public squares in the faubourg St. Mary, that a plan, manifesting the proprietor's intention to appropriate

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and dedicate a part of his land to public uses, is sufficient to affix thereto the legal character of a public place; the appellants have shown such plan: the appellees, who contend that an alienation of a public place by the sovereign, divests it of its legal character, and transfers the property to the grantee, have shown no such alienation before Louisiana became a state.

As the new state acquired the capacity to regulate the use of public things within its limits, the United States, if ever they had it, lost it; and any posterior alienation by them of such a place in Louisiana, could not change its legal character.

I conclude, therefore, that the space under consideration, appearing by the plan of the city of New-Orleans, to have been appropriated to the use of the public, and having been ever occupied as such, although, in two instances, governors favored individuals with grants of part of it, this court ought to say the *locus in quo* is part of a public place, *hors du commerce*, and cannot be claimed by an individual in a civil action.

As it is my misfortune to differ, in this respect, from the opinion of a majority of this court, it becomes my duty to examine the validity of the transfer of the premises by the United States, to the vendor of the appellees.

It is best to begin this examination by bringing once more to view some of the principal facts; they are as follow.

The ancestor of the vendors of the appellees, in one thousand seven hundred and eighty-eight, presented a petition to governor Miro, stating that the house he theretofore lived in having been destroyed in the conflagration of the city of New-Orleans, he found himself without a shelter, and was desirous of building a small house opposite to Mr. Bienvenue, and solicited the governor's permission to do so; which was granted.

Six years afterwards he presented another petition to the succeeding governor, Carondelet, stating that his small house or caban, (*cabana casita*) was rotten, and the roof so decayed that he was exposed to the loss of the few clothes he and his family had. He prayed permission to rebuild it. This was

also granted; but on the condition that the dimensions of the new house should not exceed those of the old.

In one thousand eight hundred and nine, the applicant having died, his widow laid her claim before the land commissioners of the United States, for a confirmation of title to what she called *a lot* of ground. The board state, that in their opinion, they were without authority to make any decision in the case; but expressed their belief that if congress affirmed the claim, it would be rather an act of justice than of generosity.

In one thousand eight hundred and twelve, the house being in a state of great decay, the materials of it were taken down and removed, and the ground cleared.

In one thousand eight hundred and twenty-one, the patent under which the present claim is grounded, was issued by the President of the United States.

In one thousand eight hundred and thirty, the appellees purchased the title of the widow and heirs; and one thousand eight hundred and thirty-one the present suit was instituted.

The counsel for the appellants has contended, that the patent under which the appellees claim is null and void; because it issued without authority, and it can have no legal effect or force, under the laws in pursuance of which it purports to have been issued. He has urged that the acts of congress to which the patent refers, do not relate to *urban* estates, or to lots in a city or town; that in the land laws of the United States, the word *land* has a definite and technical meaning, confined to *rural* estates. That when the laws are to be extended to *urban* estates, it is expressly and particularly done; and he has referred us to the act of congress for extending the time of payment to purchasers of public lands, in which, after granting this indulgence to purchasers, congress then makes a provision expressly, for allowing the the like time and privileges to purchasers of city and town lots. He has said, that throughout the land laws, it appears that whenever an act is intended to operate on *urban* as well as *rural* estates, an express provision is always made therefor. See *land laws*, 760, 836, 788. He has added, that the

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provisions of the acts of congress, in regard to surveying and cultivating lands, shows that city and town lots were not in the contemplation of congress.

The opinion of the executive of the United States, it has been contended, conclusively appears to have been from the period which followed the passage of the acts under consideration, that the land commissioners of the United States had no authority to pass on titles to city and town lots; such being the construction given to them by Mr. Gallatin, then at the head of the treasury department of the United States; instructions which evidently regulated the conduct of the land commissioners, by whom the appellees assert that their title was confirmed.

A decision of the Supreme Court, found in 12 *Wheaton*, 187, is invoked, in which it was determined that an authority to enter land did not include town lots; the literal meaning of the terms of the act being limited and restrained by the context; and the considerations arising out of the general system of the land laws of the United States.

2. That the act of 1818, confirms no claims to lands which are not embraced in the report of the commissioners; i. e. officially acted and reported on.

3. It relates only to land claimed under an incomplete French or Spanish grant or concession, warrant or order of survey; whereas, in the present case, no such document ever existed; such a document must contain a special location, or allude to one.

4. It has been contended, that by the erection of Louisiana into a sovereign state, the United States ceased to be the *parens patriæ*, the sovereign to whom belongs the right of regulating the use of *public places*.

The patent appears to be issued on the confirmation of a tract of land by the acts of 1801 and 1814. The petition states a confirmation, not by these acts, or either of them, but by the act of May 11, 1820. Without a title resulting from an act of congress, the patent cannot convey away any part of the lands of the United States; for congress alone has the disposal of them. The president can exercise in

regard to them no power that is not vested in him by law. EASTERN DIS.
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The patent is evidence of the conveyance. Whatever the law has given passes, but no more. No effect can be given to the patent, which is a mere emanation of the law. Beyond the law no public officer can extend or limit its operations. DE ARMAS
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If this position be true, it follows that courts of justice, from whom land is claimed under a patent, may examine its conformity, or its discrepancy in regard to the law. Otherwise, justice cannot be administered.

It has never been doubted, in the courts of the United States, nor in those of any of the states, that a judicial inquiry may be instituted, tending to impeach a patent. But conflicting opinions have been entertained as to the respective powers of courts of law and courts of equity. In some of the states, a patent is considered as *prima facie* evidence of title, and open to extensive evidence to impeach its validity. By others, that the defects must appear on the face of the patent to authorise a court of law to pronounce invalidity, and that unless the defect so appear, the patent is only voidable, and recourse must be had to a court of equity. Elsewhere, it has been considered, that a court of law may inquire, whether the patent was issued without authority, or against the prohibition of a statute, or whether the state had title to the land granted.

The Supreme Court of the United States has declared that it would be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by government to supervise the progressive course of a title from its commencement to its confirmation on a patent. But in order to guard against this conclusion, that this doctrine would lead to closing the door against all inquiry into any matter whatever, or beyond the grants for the purpose of avoiding it, the court declares that the great principles of law and justice would be violated, if there did not exist some tribunal to which an injured party might appeal, and the means by which an elder title was acquired, might be examined, if it had been acquired by the violation of principles essential to the validity of a contract, but that a

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court of equity is the more eligible tribunal in general, for these questions, and they ought to be excluded from a court of law. The court, however, adds, cases may happen in which the grant is absolutely void, or inoperative, as when the state has no title to the thing granted, or when the officer has no authority to issue the grant. In such cases the validity of the grant is necessarily examinable in law. *Polk's lessee vs. Wendell et al*, 9 *Cranch*, 87. In the same case, the same court held, that a court of law may inquire whether the patent was issued without authority, or against the prohibition, or whether they still had any title. 5 *Wheaton*, 293.

As courts of equity, as distinguished from law, are unknown to the jurisprudence of Louisiana, it follows that the courts are competent to administer justice in cases in which it must be sought in other states from a court of equity.

It has, however, been urged that the Supreme Court recognises in cases they speak of, an elder title, which presupposes a less ancient one in the defendants. But our statute places all defendants in petitory actions on the same footing. "The possessor, whoever he be, must be discharged, if the plaintiff does not make his title. *Code of Practice*, 44. A mere possessor, squatted, may demand the production of a title, for it is by the strength of the title that the plaintiff must conquer.

We are, therefore, to examine the two acts of congress, which are the basis of the opinion of the register of the general land office, on the certificate of whom the president of the United States confirmed the vendors of the appellees in their title, and the one under which they themselves allege its confirmation.

The act of 1803, relates in the first section, to claims supported by a duly registered warrant, or order of survey. The present is not alleged or shown to be supported by any such document.

The second section relates to claimants having made an actual settlement with the permission of the former Spanish officers, according to the laws, usages and customs of the Spanish government on a tract of land, and having inhabited

and cultivated it before the 20th December, 1803. In my opinion, there appears, in the present case, no such permission, and certainly no cultivation. A *permission to settle*, in the laws of Louisiana, is a well known technical expression, used to designate an incipient step in the acquisition of lands of the domain. The settlement is effected by clearing, inclosing, inhabiting and cultivating the tract. If it be on the Mississippi, the settlement includes the making a levee along the shore, and a road between the levee and the land. The section under consideration requires, that besides the permission to settle, there should be inhabiting and cultivating.

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The commissioners to whom the claim was presented, expressed their opinion that it was not one on which they had authority to act. They, however, added their belief, that the confirmation of it by congress would be an act rather of justice than of generosity.

These gentlemen did not express the reasons which induced the conclusion they came to; *e. i.* that they were without authority to act on the claim.

On my first view of the case, I thought it presented an apparent ground for their decision: the absence of any allegation or proof of cultivation.

It is, however, my duty to consider that which is presented by the counsel of the appellants, viz: that in the land laws of the United States, the word *land* is restricted to *rural*, and not extended to *urban* estate; *i. e.* city or town lots.

It appears that throughout the land laws of the United States, whenever any provision relating to tracts of land in the country, are intended to be extended to city or town lots, an express clause is added for such extension. *Acts of Congress, May 18, 1824; and March 2, 1821. Land Laws, 736, 788.*

The mention of surveys, locating, permission to settle, and imperfect grants, is also incongruous when applied to a city or town lot. Its situation, dimensions, the bearing and length of its lines are established by the plan of the city or town in such a manner as to require no survey. A patent

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may describe it without any survey or location. If it be granted, the grant is generally a complete one. There are no incipient or intermediate steps to be taken to complete the conveyance. No permission to settle; no return of any process verbal of putting into possession; no plat to be filed before the grant is finally issued.

These observations are cogent and supported by evidence, in the conclusion to which they lead; having been adopted by the executive of the United States, as appears by the instructions of Mr. Gallatin, secretary of the treasury, to the clerk of the land commissioners, dated August 6, 1811. He says: "I consider also the decisions on town lots where the title was not complete, as altogether out of the jurisdiction of the board; since one of the essential conditions was that of not only *inhabiting* but *cultivating*, an expression intended and applicable only to farms or country tracts."

In addition to this, a decision of the Supreme Court of the United States dispels any doubt that might remain. This tribunal has held, that an authority to enter lands, did not include city or town lots. They said the literal meaning of the terms of the act was restrained and limited by the context, and by considerations arising out of the general system of land laws of the United States, into which this act is ingrafted. 5 *Wheaton*, 589.

I leave the examination of the first act of congress recited in the patent, with the reflection, that I am unable to see how it can avail the appellees.

The act of 1814, is the one next mentioned in the patent. This renders it necessary I should examine it, although the appellees' ground the confirmation of their claim upon another act, viz: that of 1820.

To the act of 1814 is applicable every thing which I have observed with regard to the limitations and restraints of which the word *land*, in the land laws of the United States, is susceptible. I might, therefore, dismiss the consideration of the act with this further observation, that it cannot be correctly extended to a city or town lot.

Supposing, however, that my conclusion in this respect is erroneous, I am to inquire what claims this act confirms.

They are:

1. Those embraced in the commissioners' report.

2. Those which are supported by an incomplete French or Spanish grant, warrant, or order of survey, granted prior to the 20th of December, 1803.

3. The grant must contain a special location; or the tract must have been located and surveyed by a French or Spanish officer before that day. All this must appear by the report of the land commissioners.

It is not pretended that there was any warrant or order of survey, nor any survey whatever of the premises.

There must, therefore, be a grant. A grant of what? Necessarily of land. Did the ancestor of the vendors of the appellees apply to Miro for the grant of a tract of land, or even of a city lot? If the appellees answer that the application related to a lot, they must show that some part of the space between the houses and the stream, had ever been divided into lots. This they cannot do.

The application was for leave to build a small house or cabin, that might afford a shelter to an indigent sufferer, whose misfortune entitled him to commiseration and relief. The governor wrote "*as is requested*," and signed.

The application and permission of Carondelet, are of the same nature.

Here I am unable to see, even an imperfect grant. An imperfect grant, is one which is intended to have, but has not yet received its perfection. But this permission, though it might be continued, does not appear to have been intended to refer to a grant of land. A grant of land differs much from a permission to inhabit.

But the act of congress has another requisite. The grant must contain an actual *location*, or the tract must have been actually located or surveyed before the twentieth of December, one thousand eight hundred and three.

What is called Miro's grant, consists of the words "*as is requested*." The petition at the foot of which they are written,

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does not apprise us where the poor man wished to erect his hut, except that it was opposite to Bienvenu's house. Let it be assumed that Bienvenu's house was in front of the city. In the part of the city where the appellees contend the *locus in quo* is situated, the curve of the river leaves a distance of about two hundred feet between the first row of houses and the levee. A small cabin may be supposed to be twenty feet square; if so, five such cabins might stand opposite Bienvenu's house, between it and the levee; so the spot to be covered by the cabin was not *actually* located in the grant.

The counsel of the appellants has further contended, that the claim is not embraced in the report of the land commissioners. The act certainly meant an *official* report, i. e. one made under the sanction of an oath of office, a report made in a case in which the commissioners believed it their duty to bestow their care and attention, as officers of government.

If these gentlemen, the president and the Supreme Court of the United States, did not err, it is my duty to say, and believing they did not err, I must say the claim was one of which the board had not legal cognizance, and their report was not an official act. In other words, it was not such a report as the act under consideration refers to.

Were I of a different opinion, I should perhaps think that the commissioners, having expressed their opinion, that the claim was one over which they had no authority to make a decision, the claim was thereby officially dismissed from the consideration of the board; and that after this, any opinion which these gentlemen might be pleased to express, to soothe the disappointment of an applicant whose claim was dismissed, could not be considered as the expression of any official opinion of the board.

These reflections force upon me the conclusion, that the claim of the vendors of the appellees was not confirmed by either of the acts of congress, mentioned in the patent.

This brings me to the inquiry, whether it was confirmed by the act of May eleventh, one thousand eight hundred and twenty, as is averred in the petition.

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The first section of that act, is the only part of it under which any claim to a confirmation can be based. It is in the following words: "*Be it enacted, &c.* That the claims for land within the eastern district of the State of Louisiana, described by the register and receiver of the said district, in their report to the commissioner of the general land office, bearing date the twentieth day of November, one thousand eight hundred and sixteen, and recommended in the said report for confirmation, be, and the same are hereby confirmed against any claim on the part of the United States."

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Had the president stated, in the patent, that the claim had been confirmed by this act, the question would arise, whether this circumstance could dispense the appellees from administering proof of the claim coming within the provisions of the act.

This proof has not been administered, and as the law is the same, *non apparentibus et non existentibus*, I must say that the claim is not confirmed by this last act.

The claim being unconfirmed, it follows, the United States are still owners of the *locus in quo*, (if they ever were) and that the appellees have acquired no title under the patent.

The action is a petitory one, on which the plaintiffs cannot succeed, except on the strength of their own title, and they cannot avail themselves of the weakness of that of their adversary; no, not even in the absence of any title but the right which possession gives. This principle has come to us from the Roman law. *Actore non probante absolvitur reus*. It has been engrafted from the common law of England, into the jurisprudence of every other state of the Union. If the plaintiff does not make out his own case, he must be non-suited. Our own legislature has made it, with us a textual provision, "in an action of revendication, if the plaintiff does not make out his title, the possessor, *whoever he be*, must be discharged." *Code of Practice*, 44. We have proclaimed it in numberless cases, and very lately in those of *Phillips vs. Flint* and *Compton vs. Mathews*, 3 *Louisiana Reports*. *Harper vs. Destrahan*, 12 *Martin*, 31. *Sassman vs. Aymé and wife*, 9 *ibid*.

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267. *Abat vs. Rion*, 7 *ibid.* 562. *Herry et al. vs. Russell*,

3 *N. S.* 59. *Congregation of St. Francis vs. Laune*, *ibid.*

62. *Johnson et al. vs. Inerarity*, 4 *ibid.* 10.

On this part of the case I think the law is with the defendant.

On the plea of prescription, the appellants may, in my opinion, resist the appellees' pretensions in the name of the inhabitants of New-Orleans, as a part of the public, in the same manner as any one of them of lawful age might have done.

The public, whose right the appellants vindicate, include, not only the inhabitants of New-Orleans, but those of any other city, town or parish in the state, or even strangers. On the *locus in quo*, the public have had the use of the premises from the foundation of the city to this day. If the Supreme Court of the United States, and the late Spanish tribunals, were not in error, in the cases cited, I may confidently express my humble opinion, that to the streets of New-Orleans, that wide space which Dupauger called a *quai*, and the small square behind the Cathedral, and between it and Royal street, the public need not produce any other evidence of the right to the use but the plan of the city and the subsequent use.

It would be otherwise if the appellants vindicated a right peculiar to the inhabitants of the city, for the establishment of such a right would require the production of a title. The majority of the court are of opinion, that the city would be protected in this case by a possession of forty years. They have reckoned the possession from one thousand six hundred and nine, making to one thousand eight hundred and thirty the period of the inception of the present suit, sixty-two years, from which they deduct the possession of the vendors and their ancestor, from one thousand seven hundred and eighty-eight, to one thousand eight hundred and twelve, as twenty-four years, leaving against this possession thirty-eight years only.

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I think the possession of Bertrand and his heirs had not the character which gives it the effect of interrupting the prescription.

We have the evidence of the beginning of this possession. His was not an adverse possession, any more than that of one who had leased the house of a minor from his tutor. The public have the right to a considerable space of ground dedicated to the public use. The sovereign by his officers, regulated this use as the *parens patriæ*. The guardian and administrator of public plans, after a terrible conflagration it was deemed more suitable, that a few sufferers, reduced to distress and beggary, should be relieved by being permitted to erect temporary cabins on public places, rather than by pecuniary aid, drawn from private commiseration. In one thousand eight hundred, by the retro-cession to France, the king of Spain's will, on the occupancy of the ground covered by these cabins, was determined, by his ceasing to have the capacity of regulating the use of public places in Louisiana. This capacity passed successively to France and the United States, and finally was vested in one thousand eight hundred and twelve, on the State of Louisiana, before the patent under which the appellees claim was issued.

I think the judgment of the court below ought to be reversed, and that ours should be for the defendants.

PORTER, J.

This is a petitory action for a lot of ground, lying and situated between the front street of the city of New-Orleans, and the river Mississippi.

The plaintiffs are assignees of the heirs of Thomas Bertrand, deceased, who, in the year 1788, obtained from the then governor of Louisiana, permission to settle and erect a house on the *locus in quo*. After occupying the house built by him for the space of six years, it fell into decay, and he obtained leave to rebuild from the Spanish governor then in office in the colony. Bertrand continued in the possession thus conferred on him, up to the time of his death, which

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took place in the year 1803, and that possession was maintained by his widow and heirs until 1812; in the whole, a period of twenty-four years. From some cause or other, unexplained by the evidence on record, they then left the premises. Before doing so, they had, however, filed a notice, under the act of congress, with the commissioners of the United States, claiming the lot, in virtue of the permission to settle, and settlement in conformity therewith. The commissioners reported favorably on their demand. This report was confirmed by an act of congress, and on the 17th Feb. 1821, a patent issued from the general government, to the representative of the grantee.

The patent, it was contended, does not convey a title to the premises, because it is not one of those claims which were confirmed by the act of 1814. That act, according to the argument at bar, provides only for *lands*, a term which does not include *town lots*. Without discussing whether this position might not be correct in some cases, it is deemed sufficient to remark on this now before us, that congress must be considered the best judges of what they meant by the word *lands* in the act referred to, and that, as they had a report before them, recommending the confirmation of a claim to a town lot, and did confirm it, it is not open to us to question their construction of a previous enactment made by them. Nor is this view of the subject in any respect impaired by the last act, limiting the confirmation to *all claims which were filed according to law, and are embraced by the report*; because nothing prevented the claimant filing her title, and asking for the decision of the commissioners of the United States, although it might be doubtful, under the law, whether it could be confirmed. Again, no one has a right to make this objection, save him who claims under the United States, or some of the governments which previously possessed Louisiana. So that we are, of necessity, compelled to examine the validity of the defendants' title.

The demand of the petitioners is resisted on two grounds: First, that the defendants have title to the premises; and, Second, that the space of ground between the front street

of the city of New-Orleans, and the river Mississippi, was designated and set apart for public purposes, and could not be the subject of private ownership.

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In support of each of these means of defence, the defendants rely principally, if not solely, on a map found in the office of the Marine and the Colonies of the French government, by which it appears, that in the year 1728, a plan was made of the city of New-Orleans, by an officer holding a commission under that government. On this plan, the river Mississippi is marked with the same curve it exhibits in front of the town at this day. An open space is shown to have been left between the front street and the river; this space, opposite the centre of the city, is comparatively narrow, not more than feet. But owing to the bend of the river, the distance between it, and the street, increases rapidly as you recede from the centre, and at each extremity of the city, it extends to six hundred feet. The representation of the ground thus left vacant, on the plan produced in evidence, is inscribed with the word *quai*.

On the first point, which presents the question of title in the city, I believe the court is unanimous. Our consultations, if I understand them right, brought us to the conclusion that it had no solid basis to rest on. But, as it is relied on as a means of defence, it becomes the duty of the members of the court, who are of opinion that the other grounds assumed by the defendants are not tenable, to explain the reasons why this pretension to title cannot be maintained. The examination of the law on this point, I think too, will be found not without its utility in another part of the case. It will serve to elucidate matters involved in the inquiry, as to the alleged destination of the *locus in quo* to public purposes.

By the laws of France, a city or town could not acquire right or title to the soil of immoveables, or to the use of them, without letters patent from the king. This branch of the case was elaborately discussed at the bar, and I think the plaintiffs fully sustained the position assumed by them. To the books cited, may be added *Domat*. In treating of communities, he declares, as a primary rule, that they should be

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established for the public good, and by order or permission of the prince. Under the title *De la puissance, des droits, et des devoirs de ceux, qui ont le gouvernement souverain*, after repeating that no one can establish communities but the king, he adds, "c'est une suite du droit de permettre les établissemens des corps et communautés, de les permettre aussi de posséder des biens, meubles et immeubles, pour leur usages, et cette permission est particulièrement nécessaire pour la possession des immeubles, car comme ces communautés sont perpétuelles, leurs immeubles deviennent inalienables."—With some other observations not necessary to be quoted, he concludes, "Ainsi les communautés ne peuvent posséder d'immeubles, que par permission du prince; et a la charge de faire cesser ses interets et ceux des seigneurs. Et cette permission s'accorde par des lettres qu'on appelle d'amortissement." *Domat, Droit public, Liv. 2, tit. 2, sect. 2, Nos. 14 & 15. Ibid, tit. 15, sect. 1, No. 1, and sect. 2, No. 1. Maximes du Droit Français 58, regle 13. Guyot's Repertoire, vol. 62, pages 455, 456, 457 and 459. Denissart, vol. 4, 728—755.*

If the laws of Spain could affect this case, I understand their provisions, in relation to the rights of corporations to immoveable property, to be similar to those of France. By the 9 law of the 28 title of the 3d Partidas, the definition given of common property in towns or cities, is, those public places, &c. which are "*establicidos é otorgados para pro communal de cada cibdad o villa;*" established, and granted, to be common to a city or town.

An ignorance of the laws of France cannot be presumed in the government of that country. Not the slightest reason has been given, why they should have been deviated from in this instance, if the sovereign had intended to grant the space of ground between the first streets and the river, to the city. Satisfactory reasons can be assigned for making the plan, wholly adverse to the idea that it was to be a substitute for a grant. France, like all other civilised nations, was, it is highly probable, anxious to obtain, and at all times to preserve within her reach, a correct knowledge of her colonial possessions. Hence, no doubt, orders were given to her

officers on foreign stations, to make surveys of the ports and harbors, and to furnish plans of the towns, in her colonies. EASTERN DIST.
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That produced in evidence, was made in the year 1728. It was never delivered to the city, as a muniment of title. Its existence appears to have been unknown to the corporation, until a quite recent period. It cannot be believed, that if the king intended the inscription on the document offered in evidence, should operate as a grant, that those to be benefited by it, would have been so long left in ignorance of a fact so important to them. When, to these considerations as to intention, we add another and an obvious one, that until the town had a legal existence given to it, by letters patent, there was no corporation to which, by the laws of France, the grant could be made, I think it must appear plain to all who will consider the subject, that the pretension of title set up on the part of the corporation, cannot be supported.

But it is said, though the title to the property may not be in the corporation, still the plaintiffs cannot recover. The *locus in quo* was destined to public purposes, when the town was established; that destination was irrevocable; and the property so appropriated was forever put *hors du commerce*.

Before entering on this question, I think it proper to remark, that we may dismiss from our consideration the authorities to which we have been referred at common law. For the case before us, is not as to the rights retained at common law, by a private individual, who designates a place for public purposes. Our inquiry must be, what were the powers of the kings of France and Spain, under the laws of those countries, over a place assumed to be set apart for common use, and of which, it is admitted, no grant was made to the town. If the case was to be decided by the books referred to in the former system, I am not prepared to say, the plaintiffs could recover. They certainly carry the effect of a *destination to public use*, as it is called in that jurisprudence, to a greater length than the laws of France or Spain do. Such dedication, if once made, appears to be irrevocable, so long as the public may use the object so appropriated. The decision of the Supreme Court of the United States, places the setting

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off commons to cities, on the same grounds as that of streets and highways. That court finds no difficulty in the want of any person, natural or artificial, to accept the gift. It supposes the fee to be in abeyance until the town is incorporated, and the moment it becomes so, the title rests in the corporation. The learning and ability of the judges of that tribunal, forbid the belief that they did not correctly expound and apply the rules of their jurisprudence to the case before them. I have no doubt they did. But it appears to me, the doctrine recognised by them, would require considerable limitations and modifications, before it would be conformable to the laws of France or Spain, which govern this case. One example will show this. When commons are set apart for public use, the Supreme Court considers the title in abeyance, until a grantee exists who can accept it; and even until that event takes place, the grant is irrevocable. This principle appears wholly irreconcilable with the rule of the French law, that no community can have a legal right to the use of immoveable property, without letters patent from the king; and it is equally difficult to reconcile it with that of the Spanish, which recognises no place as common property, for the use of the city, but that which it acquires by grant, purchase, or prescription. But the discrepancy between the systems, is more marked in relation to the power of the supreme authority in the state over public places; and the difference cannot fail to excite attention in this case, because it will be found to turn, in a great measure, on the extent of that power. By the common law of England, if the king once established a port, he lost the power of resumption. He could not afterwards contract its limits. So rigid was this rule, and so productive of inconvenience was it found, that an act of Parliament became necessary, to vest that authority in the crown. I am greatly mistaken, if the political institutions of France or Spain, affixed any such limits on the power of the kings of either country. Sitting here, it is not for us to inquire which system is the best; it is sufficient if they differ, and that that which supports the pretensions of the defendants is not ours. 1Black. Com. 264.6 Pet. 431.

While on this part of the case, it may be proper to notice an argument urged from the bar, which would seem to create some difficulty in sustaining the plaintiffs' pretensions. The ground left vacant in front of the city, was compared to the streets, and it was asked, could the sovereign, after marking them out for the use of the city, afterwards make them the object of individual ownership. The Supreme Court of the United States, in the case already cited, seem to consider any ground left vacant by the proprietor in establishing a town, as subject to all the rules which govern an appropriation of land, to streets and highways. The streets of a town are no doubt what is denominated in our law public places, and they are protected from change and alienation, by all the rules which apply to things of this description. But the power of the grantor over them, even if he should be the king, is in my opinion, much more limited, than that he possesses over other things of the same kind. So long as the town remains unincorporated, and he retains the power of regulating its police and government, by laws and ordinances, he may modify, abridge or enlarge the streets, but he cannot deprive the inhabitants of the use of them; and for an obvious reason. Streets are indispensable to the enjoyment of urban property. Without them a town could scarcely be said to exist; the inhabitants of it would be as prisoners in their own houses. It may, therefore, be readily admitted, that the sovereign power of no country could deprive the owners and occupants of lots and houses, of things indispensable to the use and enjoyment of the property sold, or conceded, without violating the plainest dictates of justice, and the general principles of law applicable to all other cases of the same kind. But its inability to do so would not proceed from their being destined to public purposes, but because without them the property granted could not be enjoyed. Just as on the same principle, an individual who granted a portion of his land which could not be reached but by passing over other portions of it, would be considered as having conceded to the grantee the right of way over the part retained. It is a well settled principle, that whenever an individual

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or the law giveth any thing, there is impliedly given at the same time, whatsoever is necessary to its enjoyment. The limitation, therefore, contended for on the power of the sovereign over streets, may be well conceded to the whole extent pressed in argument, without at all affecting his authority, or his rights over vacant ground not proved to be necessary to the use of private property.

The case has been argued on the power of the crown over public places. But this presents the question in too general a shape. In my judgment the proper inquiry is, what power the sovereign, in whom the right of sale exists, has over a space of ground left vacant when the city was laid out, which was afterwards designated on a plan as a quay. But the examination of the authority in its application to any thing destined to public use, may aid us in reaching a correct result, though that result could be obtained in this particular case, without such examination.

There are two kinds of things, says Domat, destined to the common use of men, and of which every one has the enjoyment. The first are those which are so by nature; as rivers, the sea, and its shores. The second, which derive their character from the destination given them by man; such as streets, highways, churches, market houses, court houses, and other public places, and it belongs to those in whom the power of making laws and regulations in such matters is vested, (*la police*), to select and mark out the places which are to serve the public for these different purposes." *Domat, liv. 1, title 8, sect. 1, art. 1.*

Admitting, therefore, that the whole space of ground left vacant between the front street of the city and the Mississippi river, was destined to common use, and that it could not be the subject of private property, a question which will be examined hereafter, I do not see how the conclusion is obtained that it is forever to remain so. If the doctrine has any foundation to rest on, it must be this, that individuals acquire a right by the dedication to public purposes paramount to that of the sovereign by whom the dedication was made, though the right of soil, and the authority to make

regulations and laws for the police of cities, were both vested in him. This proposition I consider untenable. Reason, public convenience, and the law which governs the case, are all opposed to it. The changes which are continually produced on the surface of the earth by natural causes, and the alterations in the positions of the various societies of men who occupy it, repel such a doctrine. Places where cities once stood are now deserts. Where highways once ran, highways are no longer practicable or convenient. Turns require to be enlarged, and the public places to be changed. There is perhaps no spot on earth where the incompatibility of such a doctrine, with public convenience, and public improvement, is more manifest than in the city we live in. The river on whose banks it is placed is continually working important changes in its localities, which must be met by the labor and industry of man; and a principle of law requiring every public place to remain as it was originally designated, if we are to judge of the future from the past, would completely defeat the purposes for which that designation was first made. The same causes producing a necessity for alterations in ports, harbors, and other public places, have been in activity everywhere, though, perhaps, in a less degree than in this city and its faubourgs; and the law has provided for them. When the right to the soil, and the powers of police and city governments were united in the corporation, its legal administrators could alienate public things with the sanction of the supreme power in the state. When both were in the king, he possessed the authority without any legal restraint; and if he erred in the exercise of it, redress could only be had from him. It is true, that so long as the government preserved the destination for public use, neither the whole, nor any part of it, could be the subject of contract between individuals; and it is in this sense, I understand the various authorities referred to, which declare, that things public cannot be bought or sold. Such, it appears to me, is evidently the meaning of the passage in the Roman Digest, in which Domat lays down the general principle, that they are *hors de commerce*. "*Sed Celsus filius ait, hominem liberum scientem*

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te emere non posse, nec cujuscumque rei si scias alienationem non esse, ut sacra et religiosa loca; aut quorum commercium non sit, et publica quæ non in pecunia populi, sed in publico usu habeantur, ut est Campus Martius." Though the field of Mars could

not be an object of commerce, I apprehend we cannot safely deduce from this passage the doctrine, that the Roman senate had not the power to dispose of the field as they thought proper. I understand the law quoted from the Partidas, in the same way; and I cannot gather from it that it was at all contemplated to limit the power of the king of Spain over public places. It merely declares, what I do not doubt is true, that so long as the thing is public, it cannot be bought or sold. Toullier tells us, that property of this kind is only inalienable so long as it preserves its destination. He further shows, that the modern law of France agrees with the ancient in respect to the rights of corporations. They cannot acquire any thing for their use without the express consent of the legislature. He divides the things of which they may become the owners into two kinds; one of which consists of public edifices, roads, streets, canals, &c. They may alienate this property by the same authority under which they can acquire, provided certain formalities are pursued. To the same effect is Domat. Among these formalities, I cannot discover that it was necessary to have a law, or ordinance passed, changing the destination, that appears to have resulted from the alienation itself if made according to law. If a corporation, with the sanction of the supreme power in the state, could dispose of things destined to public use, of which they held the title, and by this alienation change their destination, I see no ground for doubting, that the sovereign, in whom this authority to approve the sale was vested, in case the title was in the corporation, could also sell at his will and pleasure, when the right to the soil and the power to regulate the city, were both retained by him. This distinction between the public places of which the property was in the crown, and those which were not, appears to have been recognized by the Roman law. The edict *ne quid loco publico vel itinere fiat* we are told did not extend to things of which

the property was in the sovereign. Individuals had nothing to do with them, and if any one erected works on them, redress was not to be obtained from the prætor, but the prefects of the prince. The *third law* of the *thirty-second title* of the *third Partidas* makes the same distinction; for it declares that no one shall build or erect works in streets or common grounds, without permission of the king, or council, as the case may be, on whose ground he builds. *Sin otorgamiento del Rey o del concejo en cuyo suelo lo ficiesse. Toullier Droit civil Français, liv. 2, title 1, chap. 3, nos. 36, 40. Ibid, 49, 50, 51. Domat, liv. 1, title 2, sect. 8, arts. 5, 6. Digest, lib. 18, title 1, l. 6. Ibid, 43, 8, 2, sec. 4. Partidas, 5, 5, 15. Ibid, 3, 32, 3.*

The principles which may be gathered from the writers on public law, do not enable us to say, that any limitation existed on the power of an absolute monarch, which forbade the alienation of property, such as that which has given rise to this contest. *Grotius* and *Puffendorf* divide public property into two kinds; one they denominate *national domain*, the other the *domain of the crown*. Of the revenues of the latter, the king when he was absolute, might dispose at his will; of the former he had only the administration. Lands formed by alluvion fell into the first class; those which were left dry by a river changing its bed were considered as making a part of the revenues of the state, and subject to alienation by the king. Under which of these divisions, newly discovered lands which were occupied by savage nations, and obtained from them by conquest or purchase would fall it is somewhat difficult to say; but the inquiry is immaterial. The practice of all the European nations which have acquired dominions on this continent, has been to consider them crown property, and as such, susceptible of alienation by the sovereign. The kings of France, of Spain, and of England, have, as far as I am informed, granted and sold, and made donations of these lands without having their authority to do so ever called in question. There is scarcely a title to land in either North or South America, which is not derived from that source; and it is now by far too late to call it in question. If then, the position always assumed in relation to the right

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of soil in the sovereign be true, and if it be also true, as I consider it is, that until a grant was made to the city, he had the power to alienate any portion of vacant land, not indispensable to the use and enjoyment of urban property, his authority over the *locus in quo* cannot be distinguished from that which he possessed over any other part of Louisiana. *Grotius on War and Peace*, liv. 2, cap. 6, sec. 11, 12. *Puffendorf lib. 8, cap 5, sec. 8, 11.*

The extent of the power of the king then, under the view just taken, I think cannot be questioned, but as the argument which limits his authority over a place such as this, to acts of administration which may have public good in view, has made an impression, it requires some further notice. That the power over the *locus in quo*, as well as other powers vested in an absolute monarch, must be assumed in theory to have been surrendered to him, and should be exercised for the public good, I readily admit; but that there existed any legal limitation on the power, from which a court of justice, either in France or Spain, could pronounce a grant such as this before us null and void, is what I feel unable to assent to. We have already seen, that according to the highest authorities, land left exposed by a change in the course of a river, made a part of the domain of the crown, and was subject to alienation. The inveterate practice of the sovereigns of Europe, in relation to lands acquired on the continent has been noticed, and if any one principle can be established in relation to matters of this kind, by a concurrent usage, it may be safely affirmed now, that these lands could rightfully and legally be alienated by the crown. This right strikes me to be in no manner inconsistent with the full admission, that these lands as a part of the domain of the crown, were given to it for administration, and for revenue. The administration of waste and unsettled deserts could yield no revenue. Profit could only be derived from their sale, or their settlement. Sale in the greater number of instances was out of the question, for men in that early period, could not be found in sufficient numbers to abandon the comforts and security of elder societies, and risk their

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fortunes and families in distant regions, among savage nations. Strong inducements were therefore required to be held out, and these inducements were in general, gifts of land. A discretion was necessarily conferred on the government, as to the mode in which these foreign possessions might be rendered valuable to the state, and it cannot be doubted that that discretion was soundly exercised, in inviting settlers, by making them donations of land. It was the only means by which the revenues of the crown could be ultimately improved, through the commerce which the colony might have with the mother country. When, therefore, in the exercise of an authority so legitimate, and so long practised, the crown makes a grant, can a court of justice cross its path, check the bounty of the sovereign, and declare the patent void, because the discretion vested in him was not wisely exercised? I am unaware of any tribunal ever having gone such a length. The grounds offered in this case may be very good, and such as should have prevented the grant being made. It is possible they were overlooked, and overlooked through negligence, and it may be admitted the case is strong enough to call on the grantor to compensate the grantee, and revoke the grant. But the considerations on which such a conclusion could be obtained, and such a decree be made, were for the sovereign. A court could not safely enter into the one, and has no authority to declare the other. Such objections, if received, would lead to interminable inquiries, and end in the most unsatisfactory conclusions. One day the grant would be assailed on such grounds as are offered in this case; on another it would be attacked, because from the peculiar position of the property, or from increased value given to the land conceded by the settlements annexed it, it would have been wiser in the sovereign to have made it an object of sale. I know of no cases where a grant from the state can be considered void, except where the state has no title to the thing granted, or where the officer by whom the grant was made had no authority to issue it. To such cases alone do I understand the Supreme Court of the United States to confine the nullity. *Polk's lessee vs. Wendall*, 5

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Wheaton, 303. In a very late case where it was contended before that tribunal, that a grant of lands in Florida was void, because the intendant had exceeded his jurisdiction, the court said "he had the power to make the grant, the terms and extent of which were within his discretion, of the proper exercise of which, we have neither the power nor right to judge." 6 *Peters*, 746.

It was said in argument, that the king could not make such a concession in this, and that still less could a colonial officer make it. The permission to settle in the present case, was given by the governor of Louisiana. Ever since the country was established, officers of this rank exercised the power, both under the French and Spanish governments to grant lands, and the legitimate exercise of that power cannot now be questioned. The same objection was taken in the case decided in the Supreme Court of the United States, just alluded to, and the answer made to it expresses so fully my opinion, and in language so clear, that I shall quote it. "The grants of colonial governors before the revolution, have always been, and yet are taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation or denial by the king, and his consequent acquiescence and presumed ratification, are sufficient proof in the absence of any to the contrary (subsequent to the grant) of the royal assent, to the exercise of his prerogative, by his local governors. This, or no other court, can require proof that there exists in every government a power to dispose of its property, in the absence of any elsewhere, we are bound to presume, and consider, that it exists in the officers or tribunal, who exercise it." 6 *Peters*, 728.

The case then stands before us as if the permission to settle had been given by the king himself. The property belonged to the crown, and as such might be alienated, unless we come to the conclusion, that although the town of New-Orleans, for whose particular benefit it was said to be set apart, could not successfully assert a right or title to the use of it, without letters patent, all mankind might. The unwise

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exercise of the power vested in the sovereign, does not enable a court of justice to declare that the grant is null. Resting on these postulates, I look around me in vain, for any safe ground on which the tribunal can assume the authority to decide, that the patent produced by the plaintiffs is void.

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But this case may be considered on other grounds than the rights in, and power of the sovereign over public places in cities where he has not made a grant of them, and I apprehend the result of the examination will be equally favorable to the pretensions of the plaintiffs. The real question here, is, what power had the king of France over a piece of ground left vacant in front of the city of New-Orleans, when it was first laid out, which space several years after that event, was represented on a plan made by the authority of government as a quay? It cannot be made a question, that the king in laying out public places, may make an absolute or conditional gift of them, or that the right conferred on the public may not be qualified and incomplete. Equally true do I consider the proposition, that this limitation, where there is no express grant, may be sought for in the laws and usages of the country, or may result from the purposes for which the destination is made. Toullier tells us, that a destination to public purposes does not prevent the acquisition of individual rights, compatible with the use which the public has in the thing so destined. *Toullier, liv. 2, tit. 1, chap. 3, no. 40.* The right acquired by the plaintiffs under this grant, is not incompatible with the loading and unloading of merchandise from vessels, which is the use a quay is destined to, and the sovereign cannot be presumed to have surrendered any thing more, than that which was necessary for the enjoyment of the thing given.

The same conclusion can be obtained on other grounds. In the first place, unless we admit that words can make or change things, the *locus in quo* cannot be considered a quay or a part of one. The word *quay* in English, *quai* in French, and the corresponding terms *muelle* or *mueco*, in Spanish, are defined by the best philologists and law writers, as artificial works erected by man. No part of the ground, therefore,

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left between the city and the river can be regarded as *quay*, save that which was prepared for the safe and more commodious reception and discharge of vessels, by the creation of the *levee*, or artificial embankment.

But admitting that a place found within the limits of a city, which answers the purpose of loading and unloading vessels, without labor being bestowed on it, could be considered a *quay*, still the undoubted fact, that in by far the greater number of instances, these places were artificial works, shows that it must be in the laws and usages which establish the rights of the owners in relation to *them*, that those of the owner of the soil, which in its natural state serves for a quay, must be sought. The books make no distinction, and reason suggests not even a plausible ground for any. The right and title to the soil, cannot be regarded as less valuable, than the materials and labor used in erecting a work of this description.

There is express authority in the Spanish law, in relation to the rights of those who by artificial works make a port, (and he who erects a quay, necessarily falls within the same principle) and we learn by it, that no part of the port belongs to the public, save that which is required to land, and to embark "*si el puerto de la mar fuere fabricado per ingenio de hombre el edificio es del que le fabrico conforme un texto: mas el puerto es de todos per ser el aqua commun.*" "If the port of the seas is made by the work of man, the edifice belongs to him who erects it, but the port belongs to all that the water may be common." If the edifice therefore belongs to the individual, and nothing be common but the use of the water, it is difficult to see on what ground the whole of it can be considered as destined to public purposes, when a portion of the work is sufficient for the enjoyment of that which belongs to the public. The facts found in the writers on the French laws, and the acts of that government, clearly in my opinion, sustain this distinction, and are utterly irreconcilable with the position, that all the works erected for a quay, or all the ground marked out as such is destined exclusively to the public use, and unsusceptible of private

ownership. In the year one thousand six hundred and seventy-six, commissioners under the authority of the French government, by ordinance, regulated the rights of the proprietors of quays in Rochelle, prescribed their duties and established the rate of tolls.

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In one thousand six hundred and ninety, one thousand seven hundred and twenty, and one thousand seven hundred and fifty-nine, there are ordinances of the king of France on the same subject, recognising the ownership of individuals of such places, and furnishing rules and regulations in regard to the houses built thereon. *Valin, vol. 2, 449 to 477.* Various ordinances passed in relation to the city of Paris, permit or direct houses to be built on the quays within its limits. *Traité de police, liv. 1, tit. 7, 102 a 106.* If the whole of the places thus marked out as quays, were *places publiques*, common to all mankind, whence this individual ownership? and how came individuals to reside in houses erected on them? The most satisfactory explanation which can be given of such a state of things, appears to me this: that after the quay was erected, the public had a right to the enjoyment of a sufficient space of it to load and unload vessels, and the right to regulate the portion destined for their use; and that the rest being private property, the owner was permitted to appropriate it to his own advantage. If this be true, there can be no error in assuming, that when the crown made the quay, or laid it out on lands belonging to the sovereign, his rights in and authority over the place, were not inferior to those of private individuals. They were indeed greater when the city was not incorporated, because to the ownership was joined the power of making regulations for the government of public places. By edicts of Charles IX. in one thousand five hundred and sixty-six, of Louis XIV. in one thousand six hundred and seventy-two, one thousand six hundred and eighty-two, and one thousand seven hundred and eight, quays as making a part of the *Petites domaines*, were alienated, which is strong and conclusive evidence, that at that time and in the opinion of these monarchs and their advisers, it was understood that all places of this kind in

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cities, did not belong to corporations, and that they might be disposed of by the king to individuals. It is contested whether the thing itself was sold, or merely the *rights* which the king had in it, but this inquiry is immaterial, if it be true that in places of this kind erected by individuals, a power existed to appropriate any portion of them to private purposes, provided sufficient space was left for the enjoyment of that part which was dedicated to the use of the public.

The case was principally, though not exclusively, argued on the laws of France, and by these laws, I have thus far considered, it should be decided. If, in the hands of that country, the ground in question belonged to the crown, it certainly passed to the king of Spain by the treaty of cession, and he owned it as it had been owned by the French monarch, unless the laws, or political regulations of the former country, changed its character, or limited the rights of the sovereign.

I have been unable to discern that any such existed. It has been already seen, by a law of the Partidas, that a *grant* was necessary, to render a place set apart for public use, common property of the city, and by another law contained in the same work, that the king might own public places in a city, because it then is a prohibition to build on those which belong to him without his consent. The regulations made in relation to the Spanish dominions in America, strengthen the conclusion that the rights of the kings were the same in both monarchies. The 4th book of the *Récopilacion de las Indias*, titles 7, 8, 9, 12 & 13, contains many minute regulations as to the manner in which cities were to be laid out in the colonies. The 1st law of the 13th title of the 4th book, has however, a very clear expression of the policy of the monarchs of Spain on this subject, and contains a direct assertion of a power, in all respects conformable to that which I consider was possessed by the kings of France. By this law, it is declared that the viceroys and governors who have authority conferred on them to lay off towns, may designate lands, for their use, and *may grant them*; but that they shall send to the king a statement of what is thus designated and given,

in order that it may be confirmed by him. "*Los vis-reyes y gobernadores que tuvierén facultad senalen a cada villa y luego que de nuevo se fundare y publare, las tierras y salares que huviere menester, y se le podran clar, sin perjuicio de tercero para propios, y enviennos de lo que a cada uno huvieren senalado, y dado, para que lo mandemos confirmar.*" It results from this law, that designation alone did not vest title, for after the designation is made, power is given to grant the lands to the city; a power wholly unnecessary, if the mere fact of laying the land off for the benefit of the community, conferred an absolute right to the use of it. The necessity of obtaining the confirmation of the king himself, before the grant or gift was complete, no doubt, proceeded from the same reason which dictated a similar policy in France, namely, that when once given, the thing was put *hors de commerce*.

The laws found in the *Récopilacion* relative to the property of towns in Spain, do not, in any respect, repeal the provisions already cited from the *Partidas*, which require title to exist in the city, before it can claim a right to the use of public places. The only modification they introduce, so far as I have been able to discern, is, that cities might acquire by purchase or prescription. From various enactments found in the compilation first named, it appears that rich and powerful individuals, the municipal officers, neighboring communities, and sometimes strangers, were in the habit of entering into and occupying the commons, lands, and other property, belonging to towns and communities. In many instances, the difficulty of obtaining possession and redress, was increased by the usurpers having obtained grants of such places from the crown itself. Several of the laws complain, that favor was shown by the courts, to the persons thus entering on the common property of the cities, and for near two hundred years, there appears to have been a constant struggle between the cupidity of individuals on the one hand, and the justice of the crown on the other, seeking to preserve to communities the property which belonged to them. *Novissima Récopilacion*, liv. 7. tit. 21. laws 3, 4, 5, 6 & 7.—The first law of the 15th title of the same book, declares it

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to be the will and pleasure of the king, to preserve the rights, rents and property of cities; that it was not his intention to grant them, and that if he should, such grants were not valid. The succeeding law of the same title and book, speaks of the property which belonged to cities, and makes enactments for better securing their enjoyment. The 1st law of the 21st title of the 7th book, provides for things which cities may have acquired by purchase or prescription, and declares they shall not be dispossessed of them. The next law also relates to city property, and the same remark applies to the various other provisions found throughout this book. As almost all the towns in Spain, at the time of passing these laws, had acquired a title, by prescription from long use, though they were originally without a grant, it is most probable the enactments first alluded to embraced all the community-property in old Spain. But in none of these laws, so far as I have been able to discern, is one syllable to be found respecting any other property but that belonging to cities; none of them speaks of that owned by the crown, and to which the community had no grant, or had acquired no right or title by prescription.

The prohibition contained in one of those laws, against officers, deriving their authority from the king, thereafter making grants, either of the property of cities, or of any lands whatever, without license from the crown, I am of opinion, applies to commons and public places held by communities in old Spain, under the circumstances already stated. The words of the law, indeed, authorise no other construction: *Los terminos, y propios, y baldios de las ciudades y villas de nuestros reynos*. The property which is common to cities, we have already seen, is that which is granted to them, or which they may have acquired by purchase or prescription. Such an enactment does not apply to property in a city newly laid off, where the king has not made a grant of the public places, or the community has acquired no title by prescription. But, admitting it applied to crown property, as well as that to which towns might have acquired a right by long enjoyment, or otherwise, it cannot be understood as

limiting the authority of Spanish governors in Louisiana. We have just as much reason for considering it not in force, in regard to the *locus in quo*, as we have in relation to other lands in the province, for the prohibition extends to all lands belonging to the crown; and the conclusion that the Spanish governors had no power to make a grant of crown property lying within the limits of a city, in consequence of this law, must bring us also to the same result, in regard to all the grants of waste lands which were made by Spain, while she possessed the territory which now forms this state. For the reasons already mentioned, the power, and rightful exercise of that power, cannot now be questioned. And before this part of the subject is dismissed, it cannot escape remark, that this ordinance, which directs that grants should not be made of commons, or other lands, *without license from the king*, is a clear recognition, that *with his license and authority*, such grants might be made; and it will remain for those who sustain the proposition that the patent from the general government is null and void, to show how the United States lost the rights over this place, which the king of Spain had, and which, by the treaty of cession, they acquired; and how, if they lost their rights over this place, they retained them over the other public lands in the state. I will examine this part of the subject hereafter; at present, I shall merely say, that I have been unable to bring my mind to the conclusion, that their right in the *locus in quo*, was less complete than that of the kings of France or Spain.

The officers of the Spanish government, during the time it exercised authority in Louisiana, gave permission to individuals, in several instances, to settle on the space of vacant ground between the front street and the river, and to some of the settlers they issued grants. These acts on their part, no doubt, proceeded from their understanding of the laws being that which I have just stated to be mine. It was not until a very late period, that any opposition was raised on the part of the *cabildo*, to the exercise of this power, and no decision was made on that opposition, when the change of government took place. But, in the year 1799, the intendant

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of the colony recognised the validity of these gifts, for notice was given in the general ordinance issued by him, in regard to public lands, to all those who had inchoate titles to any lots in front of the city, to present them, in order that they might be confirmed. There is nothing in the history of the government of Spain in Louisiana, to induce us to ascribe these acts to a wanton disregard of the rights of the city. Whether it arose from ignorance of their laws, the imperfect exposition just made of them, may, perhaps, assist in determining.

But, in opposition to the weight which may be attached to the opinions of the Spanish officers in Louisiana, in relation to the rights of the king over a public place, not granted by him to the city, it is proper to state, that, by a decision made by them, they considered, that when a private individual laid out a *faubourg*, and set apart a place for public use, he could not afterwards resume it. Their decision was appealed from, and the records filed in the superior court at Havana; but owing to its not being carried there within the legal delay, this court, without entering into the merits of the case, held, that the first decree had passed into the authority of the thing judged. Whether this decision would have been found correct, or not, under the laws of Spain, and would have been confirmed by the appellate tribunal, it is not very material to inquire, as it leaves untouched all the grounds, which have been already gone into so fully, respecting the rights of the sovereign over land of which he had not made a grant, or suffered to remain long enough in the use of the community, to enable it to acquire a title by prescription. 11th *Martin*, 620.

My investigations so far having brought me to the conclusion, that by the laws of France, its monarch retained the right to the soil, and the power of alienation, of any land in a city, for which he had not made a grant; and that the king of Spain, to whom his right was assigned, held it in the same manner, and possessed the same authority over it, the next inquiry is, whether the rights of the United States were co-extensive with those of the monarchs of these countries.

By the treaty of St. Ildefonso, his catholic majesty retroceded to the French republic, the colony of Louisiana, as he had received it; and by this cession, there can be no doubt, the government of France was restored to all the public property originally ceded by her to Spain, which the latter had not alienated. In virtue of this cession, France ceded to the United States, for ever, and in full sovereignty, (to use the language of the treaty,) the territory of Louisiana, with all its rights and appurtenances. By these expressions the ground in question passed, if it was public property. But the treaty itself does not leave this to inference, for by the 2d article, it is declared, that under the expression just quoted, are included the adjacent islands belonging to New-Orleans, all public lots and squares, vacant lands, all public buildings, &c. &c. *which are not private property.*

The right and title to the soil of the *locus in quo*, which, it is admitted, was not private property, therefore passed to the United States. Notwithstanding this, I admit, that if the kings of France or Spain had surrendered their right to alienate it, by irrevocably dedicating the place to the use of the city, the United States could not grant it to a private individual. But it is equally true, it appears to me, that if the kings of France or Spain could have made the premises now in dispute, the subject of donation to individuals, the United States have the same power.

But it is said they have lost the power by erecting the territory of Orleans into a state. The convention which formed the constitution of Louisiana, acceded to the terms on which congress admitted us into the Union, and by an ordinance, forever renounced all right or title, not to the waste *and* unappropriated lands, but to the waste *or* unappropriated lands. This word unappropriated, is not found in Johnson. Webster defines it: First, not appropriated, not applied or directed to be applied to any specific object. Second, not granted or given to any person, company or corporation. I presume it is in the latter sense the word must be understood; for if taken in the first, then the fact of the land having been applied to any specific object, a barrack, fort, or fortification, would

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make the state of Louisiana the owner of such places. The lot on which the custom house is erected, would also belong to her. This I do not think was intended, nor has it been so understood. The state of Louisiana has given us her construction of the terms used, for she has accepted a grant from the United States, of the government house in Levee-street, and the lot on which it was erected. The defendants themselves have furnished us with proof that they did not so understand the act admitting us into the Union. For they have acted under a grant from the United States of a part of the lot on which was situated the new store house in New-Orleans, to continue the street leading from Conti-street to the market house. *See Land Laws*, 611, 835. The meaning of both parties, it appears to me was, that the state should renounce all claim to lands to which individuals, or corporations had not a title. Let the case be examined as it may, I believe we are compelled to return to the main question. Could the *locus in quo* have been granted to individuals, by the monarchs of France and Spain?

I have not in coming to my conclusions, been much influenced by the facts relied on in argument, that since the change of government the corporation have applied for, and obtained from congress laws vesting a title in them to the commons laid out for the use of the city, and that they also in the same way got a title from the United States, of a lot lying between the front street and the river, within that space of ground which it is now contended the general government has no right to alienate, because I do not think these applications operate as an estoppel to the assertion of any title which they really have. Acts, such as these would be of some importance in showing the understanding of both parties in regard to the question now contested, were it not, that at the time these laws were passed, there is every reason to believe the corporation was ignorant of the existence of a plan, on which the ground in question was designated as a quay.

Some minor questions remain to be disposed of. The fact of a street or public way being laid out by the corporation

since they took possession of the lot, cannot I think impair any right which the plaintiffs had in the premises, before such street was made. The corporation of New-Orleans has no power to turn the owners of lots out of their possessions, and convert their property into streets, without at least making them compensation. Whether they have authority to do so, even on making that compensation, need not now be inquired into.

The title by prescription is not sustained. The laws of Spain required forty years possession in a community. From 1769, when that country acquired title to Louisiana, to 1831, is sixty-two years; during twenty-four of these the *locus in quo* was occupied by the plaintiffs, or those under whom they claim. This leaves but thirty-eight years for the possession of the city.

And as to the right supposed to arise from the establishment of a cabildo, and the incorporation of a city, it may be disposed of by stating, that acts of incorporation may confer a capacity to acquire, but do not in themselves operate as a transfer of property.

Another ground was taken by defendants which requires notice. It was said that the authority which the kings of France, or Spain, could exercise over such places, if in truth it could be at all exercised, arose from the union in the sovereign, of title, and right to regulate the police of the city, and that the latter power having been transferred to the state of Louisiana, by the act of congress erecting her into a state and admitting her into the Union, the United States could no longer dispose of the soil. To what weight this argument might be entitled in a case differently circumstanced from this, it is superfluous to examine. For here the Spanish government in which both right of soil in, and power of control over public places were vested, gave the possession to Bertrand, and the United States supposing nothing to have remained to them but the right of soil, have granted that.

To conclude then, I am of opinion: First, that by the patent produced from the government of the United States, all

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the right, title, and interest which they had to the *locus in quo* vested in the plaintiffs.

2. That the inscription of the word *quai* on a plan of the city of New-Orleans, found in the archives of the French government, did not vest title either to the soil, or to the use of it, in the inhabitants of the city.

3. That this plan does not establish a designation to public use of the whole of the place marked as a *quai*, which prevented the sovereign of either France, or Spain, from afterwards appropriating it to his own use, or to that of others. All designations of this kind in either country, leaving the property so designated (unless it was indispensable to the enjoyment of urban property,) subject to the disposal of the monarch, unless he afterwards granted it to the town or community where the place was situated, or that they had possessed and used it a sufficient length of time to acquire a title by prescription.

4. That if the power of the sovereigns of those countries was more limited over public places, than I have concluded, still it could be rightfully exercised over any part of the space in front of the city, not necessary to be used as a quay.

5. That the city has shown no title by prescription; none by converting the lot into a street; none by the acts of incorporation; and none by the erection of the territory of Orleans into the state of Louisiana.

The importance of the case, and the intrinsic difficulties which attend its decision, will explain in some measure, the unusual, and perhaps too great length of this opinion. After all that may be said, the difference of opinion in the members of this court will perhaps be found to arise from the opposite views entertained of the powers of the kings of France and Spain. They who feel unable to divest their minds while considering this case, of the principles of our government, or even of those of that European state which once possessed and owned the larger portion of the country which is now the United States, will perhaps conclude that limitations existed on the authority of the Spanish and French kings, which disabled them from alienating property situated

as this was. Such a conclusion cannot but be respected, when we reflect on the considerations by which it is obtained.

But the lessons which teach it, were not taught I am afraid in those countries at the time when these transactions took place, and cannot now be learned from their laws. Be the abstract attractiveness of such a doctrine what it may, the duty is devolved on us to decide, not what ought to have been the power of these monarchs, but what it actually was; and for the reasons already given, I think they had such a power, and that we are compelled to recognise it.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

MATTHEWS, J.

In this case, the plaintiffs claim title as unconditional owners of a lot of ground, which they describe as being situated in the city of New-Orleans, between St. Philip and Main streets, having a front on the old levee of eighty feet, forty-six feet on one of the side lines, and fifty-three on the other, and seventy-nine feet six inches on the rear, where it is limited by the public road, &c.

The evidences of title adduced on the part of the plaintiffs, are, First: a permission to build on and occupy the lot in question, granted by competent authority, in the year one thousand seven hundred and eighty-eight, whilst Louisiana was a province of and under the government of the king of Spain, to Thomas Bertrand. Second: possession and occupancy of the *locus in quo*, by him until his death, in one thousand eight hundred and three, and continued by his widow and heirs, until one thousand eight hundred and twelve. Third: claim filed, on the part of the possessors, before the land commissioners of the United States; are port in favor of it, by them, to congress; a confirmation by that body, according to an act passed in one thousand eight hundred and fourteen; and, finally, a patent or grant, issued in due form, by the proper authority, in the year one thousand

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eight hundred and twenty-one. All the right, title and interest which the grantees acquired, have been regularly conveyed to the plaintiffs.

The validity of the title thus set up on the part of the plaintiffs, as constituting them absolute proprietors of the lot claimed, is denied by the defendants.

The patent, or grant, from the United States, is alleged to be inefficient to convey title to the grantees, as having been issued by the president without legal authority. Reference is made to the laws under which the patent was issued, in the instrument itself; and I am of opinion, that a proper construction of them warrants the authority assumed by the chief magistraté, so far as to convey all the title which the United States had in the premises, to the grantees, and is confirmative of that which they had obtained from the Spanish government. The right which they acquired from the former sovereign of the country, and which seems to be the basis of the grant from the United States, was, as shown by the evidence of the cause, a permission to build on and occupy the lot of land in question; it was, in truth, a permission to settle on it. But the tenure by which the possessors held the premises, (perhaps) depended on the will of the power which gave the permission to possess and occupy. The authority of the government, however, which permitted the occupancy, ceased before any change of will was expressed; and that which succeeded, has, by its grant, rendered the tenancy, which may have previously been temporary, absolute and unlimited; giving to the grantees all the right and title which any of the sovereigns of the country at any time had, to the parcel of ground now in controversy—according to the various transfers which took place, from the king of France to the Western Company constituted by his authority; from them retro-ceded to their sovereign; from this power ceded to the monarch of Spain; from him to the French republic, and from the latter to the United States.

According to this view of the case, I consider the plaintiffs as standing in the situation of persons claiming property under a grant from the Spanish government, as the basis of

Permission having been given by the governor of Louisiana, when a province, to occupy and build on a lot of land in the city of N. Orleans, and the authority of the government which gave the permission, having ceased with out a change of will being expressed, a subsequent grant by the president of the U. S. to the occupant, under that permission, vests in him all the right and title of the U. States, and of the former sovereigns of the country.

their title; and consequently, they must succeed in their claim, unless the defendants have shown a better title in themselves, or that the property claimed was inalienable at the time of the grant, either from its place amongst other natural things, or by political and legal destination. It is already perceived, by the bare statement of these premises, that I assume as true, the right of property in the sovereign of Spain, to all the unappropriated territory of the province of Louisiana, such as it was held by France, previous to the cession to the Spanish monarchy by the former owner.

By the transfer, all the lands of the colony not previously granted, became a part of the public domain of the king of Spain, who, at the time of the acquisition, possessed complete and unlimited sovereignty over all his dominions. Certain portions of this sovereign power, were necessarily delegated to viceroys, governors, and other colonial officers of the king; by this delegation they possessed limited attributes of sovereignty, amongst which appears to be the right to concede or grant to individuals, parts of the land belonging to the public domain. The truth of this position is evidenced by the uniform mode by which grants were obtained in Louisiana, whilst under the dominion of Spain; and it cannot be denied, that this power was exercised by the proper officers at the time when the permission to build on and occupy the *locus in quo*, was allowed to Bertrand, under whose heirs the plaintiffs now claim title, this permission having since assumed the character of an unconditional grant.

Whatever questions may have been raised and commented on by authors, who have examined the different political institutions of the states and kingdoms of Europe, relative to the right of their sovereigns to alienate certain things belonging to the public domain; certainly no doubt can now properly exist as to that right, in relation to the vacant and unappropriated lands in their colonial dominions; which have been constantly granted to individuals ever since the establishment of colonies in America.

The title or right of property claimed, to the lot in question, by the defendants, as a common of the city, has been

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While the province of Louisiana formed a part of the dominions of the king of Spain, he had the right of property in all the unappropriated territory of the province.

The king of Spain delegated to the governor of Louisiana, while a Spanish province, the right to concede or grant to individuals, parts of the land belonging to the public domain.

The sovereigns of Europe have the right to alienate the vacant and unappropriated lands in their colonial dominions.

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so fully examined by the judge with whom I concur in opinion as to all the important questions presented by this case, and so clearly shown to be without foundation, that I deem it needless to investigate this point of the cause. In truth, as to this matter, no difference of opinion seems to be entertained by any one of the members of the court.

A plan of the city of New-Orleans, which purports to have been made in 1728, is introduced in evidence on the part of the defendants, obtained from an office in Versailles; a place of deposit for official papers and documents relating to the cities and forts of the French colonies in America. This document is relied on by them as establishing a right of use to the public, incompatible with private ownership of any part of the space of land marked and designated on this plan by the word *quai*. The city being laid out in front of a bend in the river formed by nature, in such a manner as to exhibit a portion of an ellipsis, the plan shows an irregular space between the first line of houses and the river, which is much wider at the extremities of this bend than in the centre; and this is the space denominated a *quai*; the greater part of which has never been used as such, particularly towards the limits of the city.

The question as to the right of property in the corporation being disposed of, it only remains to examine their opposition to the claim of the plaintiffs, on the assumption that the lot of ground sued for, was at the commencement and perfection of their title, a place designated and appropriated perpetually to the use of the public, by legal effect of the establishment and plan of the city; and consequently inalienable as being unsusceptible of individual ownership.

In the investigation of this question, much reliance was placed on the proper meaning of the word *quai*, and a just idea of the thing intended to be conveyed to the mind by its use; the assistance of philology must necessarily be called in aid, for in this respect, it is in some degree an affair of words.

The definition given to this word in French, according to the *Dictionnaire Critique de Feraud*, is "*Levéé fait entre la*

riviere, ou l'eau d'un port et les maisons, pour la commodite du chemin, et pour empêcher le débordement dans les creux d'eau." EASTERN DIS.
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The meaning of this word as understood in France and her colonies, (according to the citation made by judge Moreau, in his Brief of Argument, from *Langlade, Nouvelle Legislation, aut mots plans des villes,*) does not materially differ from the definition given by Feraud. By this author, *quai* is defined to be "*Une levée souvent revêtu de peine detaille, dans les villes ou ports situés sur les revieres navigables et dans un espace laissé vacant entre la riviere meme at la premiere ligne des maisons, pour la commodite du chemin, et pour empêcher le debordement de l'eau.*"

The definition by other French lexicographers, is nearly similar to that quoted by Feraud. (*See Duboille and Deverger.*) These philologists show that it conveys the idea of an artificial work or bank raised by the labor of man. Quay, according to Dr. Johnson, means an artificial bank to the sea or river, on which goods may be conveniently unladen.

The greatest portion of the space delineated on the plan of the city introduced in evidence, as existing between the front line of houses, or lots laid out for building on, and the river, was evidently not a *quai*, (according to the general acceptation of that word,) at the time this plan was made; nor was it such at the time Bertrand obtained permission from the proper authority of the Spanish government to occupy the lot of ground now in dispute. Neither was this small space a part of the *quai*, properly speaking, at the time of the grant from the United States; for it appears by the testimony of the city surveyor, that the levee was not extended over it until the year eighteen hundred and twenty-two, and the grant bears date the year preceding.

But, perhaps, it may be required that some effect should be given to the word *quai*, inscribed on the plan. This may be done by allowing it reference to that part of the space whereon it is found, which was a *quai*, according to the meaning of the word as generally received; *i. e.* the levee which existed on the bank of the river and the shore, between the exterior of the levee and the water.

The word *quai*, includes the levee on the bank of the river, and the space between the exterior limit of the levee and the water.

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If, however, it be admitted that this whole space was intended to be a *quai* of the port of New-Orleans, it does not follow as a legal and necessary consequence, that no part of it could be alienated by the sovereign of the country; it being admitted that this species of property may be either public or private. And it seems to me to be of the very essence of the inalienability of things according to political rules, that they are not susceptible of private or individual ownership.

Toullier, in his Commentaries on the *Droit Civil Français*, distinguishes between things belonging to the public domain which are susceptible of private property, and those which are not. Amongst the latter class are placed navigable rivers, ports, harbours, roads, (*les rades*) which, by their nature are not more susceptible of possession by individuals, than the sea and the waters which cover it, of which the right of property is vested in no one, but the use of which is common to all; subjected to police regulations which direct the manner of enjoying it. *Volume 3, no. 36.* All other things belonging to the public domain are susceptible of private ownership; but some of these enter into commerce, others do not. *Number 38. Les biens hors du commerce, sont ceux qui ne sont pas susceptibles d'une propriété privée. Tels sont les chemins, les routes, les rues, les edifices publics, les eglises, les portes, murs, &c.* *Number 39.* These Commentaries, although purporting to be on the *Code Napoleon*, seem to embrace in part the doctrines contained in Domat's Treatise on the Public Law of France. In the section of that work which treats of things which serve for public uses, we find express mention made of public places, which may be considered as *hors du commerce*.

Political regulations similar to those which exist in France, seem also to prevail in the Spanish monarchy. See 5 *Partidas*, title 5, case 15, with the notes of *Lopez*.

They appear to have been adopted from the Roman Civil Law, or as sometimes denominated, *jus gentium*, perhaps improperly.

The principles on which these regulations are based, are to be found in the *Roman Digest Book*, 43, titles, from 7 to 12,

inclusive. A great proportion of the laws which these titles contain, are mere police rules or ordinances, perhaps inapplicable to modern states and kingdoms. Their principal utility in affording any light on the present investigation, arises from the definitions found therein of things public, or such as are appropriated exclusively to public uses.

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To admit the right of the defendants to question the title of the plaintiffs, derived as it is from the sovereign power of the country, without showing any title in themselves to the thing in litigation, it must rest solely on their authority to interfere in relation to the police of public places; and whether this authority extends to places which in no manner belong to the city might be questioned. The United States by virtue of that sovereign power, (limited as it may be in regard to the several states of the Union) have full authority over all the ports which belong to this Union, necessarily to enable the general government to collect duties imposed on foreign merchandise. By them ports of entry can be established, and perhaps abolished. And there would be nothing unreasonable or unjust in an assumption of power in them, to regulate quays, as an appendage of the ports, where all goods imported should be landed, to facilitate and secure collection of the public revenues.

The United States have full authority over ports of entry; they can establish, and perhaps abolish them; and they may regulate quays as appendages to them.

But let the case be considered as if the defendants had a right to interpose, and contend for the public use of the *locus in quo*. It is a public place, either from its natural situation, or by destination of the sovereign power which laid out the city. It is not a place which the public have a right to use in common, by its nature. It is no part of a navigable river, or of the bank of such river. "*Ripa ea putatur esse quæ plenissimum flumen continet. Secundum ripas fluminum loca non omnia publica sunt: cum ripæ cedant ex quo primum à plano vergere incipit usque ad aquam.*" R. D. 43, 12, 111, 1 and 2. It is proper here to give the translation of Roduguoz. *Los terrenos inmediatos á las riberas de los rios, no todos son publicos; porque cede á la ribera todo lo que empieza á declinar desde lo llano hasta el agua.*

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ground is left va-
cant on the plan
of a city, is not
sufficient to show
it to be a public
place.

On the border of the Mississippi, that space which extends from the exterior limit of the levee to the water, may be considered as the bank, where no batture intervenes; the lot in question was out side of the levee at the time of the commencement of the plaintiffs title, and continued to be so situated up to the period of the grant from the United States. And it was not at either of those periods a part of the public highway or road for its location is betwixt the levee and the road, as they then existed. By the aid of philology, it has already been shown, (properly speaking) that it made no part of the quai. Was it any part of a public plan, *place publique* in French, *plaza* in Spanish? It is not designated as such on the plan of the city, and I do not think that the bare circumstance of its having been left vacant on that plan, suffices to give this character to that space, of which it made a part. This seems to have been the understanding the officers of all the governments into whose hands Louisiana has fallen at different times. Witness the apparent occupation of lots for private purposes, situated within its limits, according to one of the plans exhibited, as having been made whilst the colony was under the control of the Western Company or of France; the grants of various parts of it by the authorities of Spain, and finally the grant now produced for the lot in dispute. The grants from the Spanish government were to Lioteau, to Magnon, and to Metzinger. The title under this last grantee, was questioned by the corporation of the city, and a decision of the Supreme Court pronounced, in the case as reported in 3 *Martin*, beginning at page 303. This decision is cited by the defendants in the present instance, as favorable to their pretensions. I cannot view it in that light. I do not perceive that the production of the plan of the city, places them in a more favorable situation in the present case, than they were in the former. This plan does not show the *locus in quo* to be a part of a street, public road, or any other public place. In my view, it is a part of vacant land in the city, which belonged in full and unconditional property to the Western Company of France, and as such was by them retroceded to that monarch, and as

such has from him through intermediate transfers been regularly transferred to the United States, was a fair subject of alienation, and has been legally granted to Bertrand's heirs, under whom the plaintiffs claim title.

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Squares or other spaces of land appearing to be left vacant in the plan of a town or city, are not (in my opinion) in consequence of this fact alone, to be considered as public places, and irrevocably dedicated to the use of the whole world. The plan ought to contain something on its face to show their destination and appropriation to such use, in order to imply a promise on the part of the original owner of the soil, and founder of the city, that they should always remain open for the use of the citizens and the public in general.

The plan of the city must show the destination and appropriation of lots to public uses, and as public places, in order to imply a promise on the part of the original owner of the soil and founder of the city, that the lots shall always remain open for the use of the public.

There may have been want of wisdom and foresight in the sovereigns who made these grants as above stated. The occupancy and use of the lots thus granted by individuals, and for private purposes, may be very detrimental to the interest of the public at the present time, in consequence of the increased and increasing commoner of the city. But these are considerations which cannot be taken into view, in deciding on the vested rights of the parties litigant, involving mainly questions of title.

In deciding questions of title, the court cannot take into view the want of foresight in the sovereigns of the country in granting the land in controversy to individuals, or the great detriment which the public interest may sustain by the appropriation of the land to private purposes.

In truth I am unable to perceive any substantial difference existing in this case, from that of Metzinger, and I hold the *maxim stare decisis* to be a good one. The same measure of justice should be meted to each and every one standing in similar circumstances.

It is seen from this view of the case, that I have omitted to consider many of the authorities which relate solely to police regulations, touching the property of a state, or that of a city, or town incorporated, believing that they afford little aid in the decision of the present dispute.

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Eustis, for appellants, moved the court to grant a rehearing of this cause, on the following grounds:

1. That the validity of the patent could be inquired into under the decisions of the Supreme Court of the United States.

2. That it is an error of fact to assume that there was any permission from the Spanish government to *settle on and occupy the lot in controversy*.

3. That it is an error of fact to assume that the commissioners acted in a legal sense on the claim of those whom the plaintiffs represent.

4. That it is an error of fact to assume that the spot in question was what is called in the land laws *vacant land or lands*.

5. That the sense in which the word *quay* is used by the court, is contrary to its known application in the country to whose language it belongs.

6. That as to the fact of the destination of places for public purposes, the rule must be the same every where, unless there be a positive law to the country: It being a matter of contract, and what is just in one place, is just in another.

7. That the principles laid down in the cases relating to the cities of Cincinnati and Pittsburg, have been recognised in Louisiana under the Spanish dominion, by the highest judicial tribunal in the colony, and virtually in the case of the present defendants against Metzinger, in which this court says "*no plan of the city has been exhibited to show that the lot of the appellee is located upon a place which had been reserved for public use*:" because if a plan of the city could have shown the place to have been reserved for public use, it must have had the same legal effect, which it is contended the plans of the city in evidence ought to have.

8. That by the plan and establishment of the city, a *quai* was established in front of the city as described in the plans.

9. That a *quai* in French is a public place, of which the public have the use, and which of right must be free and open to all; as roads, streets, harbors, ports, &c.

10. That the use of the spot in controversy is necessary to the enjoyment of the other public rights, the free and convenient use of that part of the port.

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11. That if the front of the city, as laid down in the plans, was constituted a quay or public place, the right of the sovereign over it was a matter of prerogative, which varied according to the different institutions of the government to which Louisiana has been subjected.

12. That the right of soil might be in the sovereign, and the use in the public; that this was the case in all public places in Louisiana as in England, under the common law.

13. That this right of use is a vested right, as much so as any right of property; it is subject to the regulation of the sovereign power alone, viz: the power in which the right of making laws is vested.

14. That this sovereign right of regulating the uses of public things is inseparable from sovereignty.

15. The United States held this power during the time they held the sovereignty of Louisiana.

16. That on the admission of Louisiana into the Union by the act of April, 1812, this branch of sovereignty, was vested in the state of Louisiana and ceased to be in the United States.

17. That subsequently to that period, the United States have no more right to regulate the use of public places in Louisiana, than in Virginia or New-York.

18. That although the United States had the right of soil in the streets, beds of rivers and public places in Louisiana, it was held in right of sovereignty and not as property subject to alienation.

19. That after the admission of Louisiana into the Union, the United States, by the operation of the constitution, was divested of this ultimate sovereign right, which fell to the state of Louisiana.

20. That the state of Louisiana has alone the right of regulating the use of public things in Louisiana, and as the sovereign has the right of disposing of the soil of all shores of the sea, roads, ports, and public places, not being private

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property, when their destination becomes changed, so that they can be no longer continued in the public use.

21. That the law of prescription is with the defendants.

22. That no act was done by the French royal government in derogation of the original plan of the city. No attempt was made to change the destination of the place as a quay or to appropriate it to private purposes.

23. That the Spanish government never alienated the spot in controversy; that the permissions to build were temporary and precarious and conferred no rights to the tenant adverse to the public right.

24. That by the laws of Spain the crown could not alienate public places, although the crown could regulate the use, and grant permission to build on them.

25. That by the laws of France under the consular government, if *quais* appertained to the domain, they formed a part of the *grand domain*, the right to which is inseparable from the sovereign power, and was held in sovereignty and not as property.

26. That on this hypothesis, that is of quays appertaining to the grand domain, the United States acquired and held the spot in question in sovereignty and not in property.

27. That this distinction between the right of property and the right of sovereignty is recognised by publicists, and necessarily exists in all governments. *Dom. Pub. Law*, b. 1. tit. 6, sec. 1, art. 1, 2.

28. No alienation of this spot having been made by any of the preceding governments of Louisiana; none having been made by the United States while they held the sovereignty of Louisiana, the rights of the public can only be affected by the legislation of the sovereign power, which on this subject is vested in the state.

29. That the title of the plaintiffs emanating from a power which had no authority to grant it, having no jurisdiction or authority over the soil, or its uses, is null and void; and the defendants must be left undisturbed in the enjoyment of their public right.

The motion for a rehearing in this case, was refused.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where a party claims rent from the day of judicial demand until judgment, and the inferior court adjudge it, the judgment shall not include the rent accruing between the day of the rendition of the judgment and its affirmance by the Supreme Court.

The Supreme Court professes to correct such errors only as are appealed from.

The plaintiffs in the present suit are the heirs of Christopher R. Elliott, who died in one thousand eight hundred and eleven, in the city of New-Orleans, leaving a widow and several minor children then residing in the state of South Carolina. The object of the suit was the recovery of the rents of a lot of land, situated in New-Orleans, and in the defendant's possession, as was alleged, from the 2d of April, 1831, until the 10th of June, 1832.

In April, one thousand eight hundred and thirty-one, the plaintiffs, by a decree of this court, recovered of the defendant the lot of land, which had been sold by the register of wills without the authority of the court, as part of the vacant succession of the plaintiffs' ancestor. *Vide. 2 La. Rep. 326.*

In April, one thousand eight hundred and thirty-two, the same case came again before this court, the vendor of the defendant having appealed from the decision of the District Court, to which the case had been remanded for an inquiry into the rents and profits and the value of the improvements. That court estimated the rents of the lot in question due by the defendant, at the sum of four hundred and seventy dollars. That court rendered judgment also against the defendant's vendor, for the value of the property and for the rents and profits. The Supreme Court reversed this decision in several particulars, but left the estimate of the value of the rents untouched. *Vide. 3 La. Rep. 545.*

In June, one thousand eight hundred and thirty-two, according to the final decree of this court, the plaintiffs were

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put in possession of the lot. They afterwards instituted the present action to recover the rents from the period of the last decision of the District Court, to the day on which the possession was restored. The plaintiffs had in their petition in the former suit, prayed for rent from the judicial demand to judgment.

The defendant pleaded the exception of *res judicata*, because, as he alleged, the court below had adjudged the subject matter of this suit in the former one. The court sustained this exception, and the plaintiffs appealed.

Hennen, for appellants.

I. W. Smith, on the same side, made the following points.

1. The thing demanded in the present case, is not that which was claimed and decided on in the former suit; therefore, although, the cause of action and the parties are the same in both cases, the former judgment cannot now sustain the plea in bar of *res judicata*. *La. Code*, 2264, 2265. *Code of Practice*, 539. *Pothier Traité des Oblig.* nos. 851, 889. 1 *Starkie on Ev.* p. 202.

2. The evidence offered by the plaintiffs in the former suit, will not sustain the claim set up in the present action. 10 *Toullier Droit Civil Français*, chap. 6, sec. 3, art. 1, nos. 159, 160. *Kutcheon vs. Campbell*, reported in 3 *Wilson's Rep.* 308, 2 *Wm. Blackstone's Rep.* 831, and 2 *Shower's Rep.* 213. *Phillips on Ev.* p. 236. 6 *Durnford and East's Term Rep.* 609, *Seddon vs. Tutop*.

3. The decision in the former case can reach only to facts existing at the time when it was pronounced, and the rent for which this suit is brought, became due since that period. 10 *Toullier Droit Civil Français*, chap. 6, sec. 3, art. 1, no. 157. 1 *Favard de Langlade*, p. 480, aux mots chose jugée. 1 *Starkie on Ev.* p. 185, (*Phil. Ed.* 1832.)

Denis and Soulé, contra.

MARTIN, J. delivered the opinion of the court.

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The plaintiffs claim the rent for a house of theirs, which the defendant occupied or received the rent of, from the 2d of April, 1831, the day on which the District Court gave judgment in their favor, for the recovery of the premises and the rents then due, until the 10th of June, 1832, on which the possession was surrendered to them on our affirmance of the judgment of the District Court, 3 *Louisiana Reports*, 541, at thirty-two dollars per month, the rate allowed in the District Court. This was resisted on the exception of *res judicata*, the exception was sustained, and the plaintiff appealed.

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It appears to us the District Court erred. The judgment of the District Court cannot have been given as to any matter posterior to its rendition, in settling the plaintiffs claim up to the day, and nothing more was asked or could have been given.

Where a party claims rent from the day of judicial demand, until judgment, and the inferior court adjudge it, the judgment shall not include the rent accruing between the day of the rendition of the judgment, and its affirmance by the Supreme Court.

Our judgments profess only to correct errors in those of the first courts which are appealed from. We cannot therefore take notice of any right accruing after the judgment complained of. Our decrees settle, therefore, claims as they stood on the day the District Court settled them. They have rights accruing after the judgment below untouched. The present plaintiffs are consequently entitled to have their claim for any thing posterior to the first judgment examined.

The Supreme Court professes to correct such errors only as are appealed from.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the exception overruled, and the case be remanded for further proceedings, the appellee paying costs in this court.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where a plantation was sold as containing ten arpents fronting on the then rear limit of the city of New-Orleans with seven in depth, which run on the bayou road, and the *locus in quo* was found to measure fourteen arpents in front, of which three on the right side of the road going to the bayou, did not touch the then limit of the city, the vendee was decreed to take ten arpents in front, beginning at the corner of the tract left of the bayou road, with the corresponding depth.

If, in the description, under which a plantation is sold for partition among the heirs and co-proprietors, there are words of doubtful import, they must be construed so as to refer to a sale of the entire plantation.

The title to a tract of land, acquired by adjudication, and which has been regularly transferred to the present occupant, is not affected by the manner in which the intermediate proprietors possessed and used the land, except so far as prescription may be interrupted.

For the prescription of ten and twenty years, there must be an uninterrupted, *bona fide* possession, and a title translatif of property on a contract or deed under which the party is put in possession.

The sale of an entire tract of land by limits for a whole and definite price is sale *per aversionem*, and the circumstances control a problematical description of quantity.

So long as a person occupies a part of his plantation, his civil possession extends over the whole.

The situation of a tract of land so that the balls from the guns of a fort must pass over it, is insufficient to interrupt possession.

This was a petitory action, in which the plaintiffs, as heirs of the Chevalier de Morand, senior, claimed a tract of land situated in the city of New-Orleans, extending from the road leading to the bayou St. John, along Rampart-street, to the south corner of the public square, where formerly

stood fort St. Ferdinand, and running back from this corner fourteen arpents by ten on the north eastern limit, &c.

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In 1731, the ancestor of the plaintiffs purchased by public act of the India Company, their brick yard, which in the act was described as "*consistant en dix arpens sur le chemin du bayou et sept vers le terrain de Jesuits.*"

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In June, 1756, Morand obtained from Kerlerce and Dauberville, acting in behalf of the French government, a concession of a triangular lot bounded by Rampart-street, the south eastern side of the brick yard, and a continuation of the north eastern limit of the brick yard to Rampart-street. Also a concession of a lot situated on both sides of the bayou road, extending on the left side in going to the bayou along the brick yard, and continuing beyond it, with its opposite side parallel, and its exterior limit perpendicular to the side line of the brick yard, and the other limit is referred to in the concession as "*le coté qui regarde la ville parallele du fond de derniers islets et a quinze toises quatre pieds de distance.*"

Morand and his family occupied a house on the premises, which he had by this grant and concession acquired. He had also there a shed, negro cabins, and two brick kilns. He made excavations for the use of his brick yard on both sides of the bayou road. He enclosed a garden on the land. The premises became known as the Morand plantation.

In October, 1756, Morand died, leaving four children, to wit: Marie Morand, Charles Morand, Vincent or Chevalier Morand, and Charles Louis or Doquemenil Morand, who were all minors. The petitioners are the grand children and descendants of these, except of Doquemenil Morand, who died without issue. In consequence of the minority of the heirs, the property or plantation of their father, was farmed out until the 30th of January, 1772, when in order to effect a partition, an inventory and appraisement of the plantation were made. The Spanish tribunal then ordered the property of the succession to be sold at public auction. The assessor-general superintended the sale, and the process verbal of the adjudication states, "that in order to complete the antecedent decree, they proceeded to the fourth and last inquiry *de la*

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finca y habitacion, together with the cattle and sheep mentioned in the annexed interrogatories. It further states that the said plantation, with the utensils and cattle, were adjudicated to Charles Morand, the son, as the highest bidder, conformably with the before mentioned interrogatories." This sale took place April 7, 1772. Charles Morand, the son and heir, sold the plantation, containing seventeen arpents front on the rear of the city, and running back seven arpents, but with its appurtenances as he purchased it at the sale, limited in its rear by lands of Doquemenil Morand to Paul Moreau, by public act passed the 25th of April, 1775. In March, 1800, this plantation, by the name of the *Morand plantation*, was purchased at the sale of Paul Moreau's succession, by Claude Tremé and Julie Moreau, his wife, and daughter of P. Moreau; and on the 17th of March, 1810, it was sold by Tremé and wife, to the corporation of New-Orleans. During the interval, from 1756 to 1810, different persons had lived on and possessed different parts of the Morand plantation, under the successive proprietors up to its purchase by the city. Since the latter purchased it, the whole has been laid out into lots, and now forms part of the city, and is in possession of the various proprietors of said lots.

The evidence of the case showed that the whole of the plantation as owned by the Chevalier Morand in his lifetime, as far as the limits of Doquemenil Morand's land, now owned by Griffon, was possessed by the successive vendees from 1772 to 1810.

The defendants pleaded a general denial, and the prescription of ten, twenty and thirty years. They completed a chain of title from the adjudication in 1772, to the purchase by them from Claude Tremé and wife in 1810, whom they cited in warranty.

Judgment was rendered by the District Court for the defendants, and the plaintiffs appealed.

Strawbridge, for appellants.

Moreau Lislet & Eustis, contra, contended as follows:

1. The possessions of the ancestor of the plaintiffs are comprised in three principal separate tracts, and were acquired in 1731 and 1756. It cannot be contended that any of these tracts have been sold separately, because in the location assigned by the plaintiffs to the defendants, portions of each of the tracts are given to them.

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2. There is nothing in the evidence which shows that any one of them was a separate establishment, or which contravenes the idea that all the land in that direction held by the ancestor, Morand, was not included under the denomination by which the estate was advertised and sold.

3. The corporation holds the premises in controversy under an adjudication on the 7th April, 1772, to Charles de Morand, the son, when the sale of his ancestor's succession took place. The words of the adjudication are, *finca y habitacion dicha tierra y habitacion*.

4. It cannot be contested, and it has been fully conceded, that this adjudication is a sale *per aversionem*, but it is contended that the whole estate of Morand did not pass by the adjudication, but merely the quantity mentioned in the inventory, leaving to the ancestor of the present plaintiffs, the immediate heirs of Charles de Morand, according to their location, a large space of ground situated between the public square and Ursuline-street, extending back in the rear to the plantation of Griffon.

5. A reservation of any part is inconsistent with a sale *per aversionem*. The effect of a sale *per aversionem* is to destroy an admeasurement, or any designation of quantity; this is of its essence, and which distinguishes it from sales *per mensuram*. In the sale *per aversionem*, the object is sold and the quantity is immaterial. *Cuney vs. Archinard*, 5 Martin, N. S. 242. *Pothier, contrat de vente*, nos. 254, 255. *Digest*, lib. 18, tit. 1, lex. 40, sec. 2. *Ibid.* lib. 19, tit. 1, lex. 42. 2 *Hulot*, 550. 3 *ibid.* 7. *Pandects*, translated by Breard Newville, vol. 19, nos. 68, 71, p. 433, 441. *Faria, Commentary on Corruvias*, vol. 4, p. 34, no. 30. 2 *Johns.* 37. 7 *id.* 217. 15 *id.* 471. 18 *id.* 449. *Gomez, varias resoluciones*, vol. 1,

EASTERN DIST. part 2, ch. 2, no. 16. *Dictionnaire du Digeste, verbo vente*, p.
March, 1833. 555, no. 71.

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6. The words used in the act of adjudication, are *finca y habitation*. The meaning and effect of these expressions are *land and plantation*. The Morand plantation was the only settlement on the bayou road this side of the plantation of Griffon, between it and the city. It was called and known by the name of its proprietor. The other plantation is mentioned in the inventory, as a plantation a *Tchoupitoulas*, and is described in the sale of the 8th of April, 1772, as belonging to the succession of the late C. de Morand. The Morand plantation is called the principal plantation, in the partition of Morand's succession. It was his last place of residence, and upon it the sale was made under the denomination before recited.

7. The sale was made without reservation of any part of the Morand plantation. The purchaser was one of the owners, and consequently well acquainted with the proceeding in relation to the affairs of the succession. He expressly says in his sale to Paul Moreau, that he sells the property as of about ten arpents fronting the city, by a depth of seven on the bayou road, and by a depth of twenty-two arpents on the other side of the bayou road, with the buildings, dependencies, &c., bounded on one side by the tract of Docquemenil Morand, (now Griffon's) and on the other by the city, &c.

8. If the sale of 1772, be a sale *per aversionem*, as it is admitted to be; if it be of the Morand plantation, and if the boundary proximate to the city be of ten arpents fronting to the city, the land in question, part of the circus square, passed to C. de Morand, and from the plaintiffs' ancestor.

9. The defendants claim and possess under complete titles. Claude Tremé, under whom we claim, received and delivered to us the original titles. We possess to the extent of our titles, and we invoke the benefit of prescription; of the benefit of half a century. The record contains a full account of the ages of the parties plaintiff, and of the births and deaths of their ancestors, from 1772 to the institution of this suit. From this it will appear prescription is complete against the whole of them.

10. The laws of prescription which govern the case, are those of Spain and not of France, up to the repeal of the former in 1828. In this case the Spanish laws are authority, and the French are not. The Roman law being the foundation of the Spanish, is not without its authority, as has been repeatedly recognised by this court. From 1825, we have the *Louisiana Code*.

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11. By the Spanish law, possession of an immovable ten years, in good faith, and holding by a just title, such as by purchase, exchange, donation, or as a legacy, while the owner was in the country, or twenty years if out of it, such person will acquire the thing by prescription. *Partida*, 3, 29. 18.

12. If a man have continued the possession of an immovable thirty years or more, and no suit brought against him during the time, he will acquire it by prescription; even if it has been stolen, or obtained by violence or robbery. In this prescription, good faith is not required. *Partidas*, 3, 29, 19 and 21. 6 *Febrero*, 2, lib. 3, ch. 2, sec. 4, no. 457. *Institutes Civil Law of Spain*, 108. *Johnson's translation*.

13. Immovable estates may be prescribed after thirty years possession, though possessed without title and knavishly. *Old Civil Code*, art. 66, p. 486.

14. All actions, real, personal and mixed, are prescribed in thirty years. *Recop. lib. 4, title 15, law 6. Institutes Civil Law of Spain*, 109.

15. The person pleading this prescription, is not obliged to produce any title, nor can it be alleged against him that he acted knavishly. *Civil Code*, art. 65, p. 486.

16. It cannot be disputed here that the defendants and their predecessors, had the only kind of possession of the lots in question, of which the property was susceptible; at least we had civil possession of them, which is as available to the party as corporal possession. *Partidas* 3, 30, 2. *Institutes of the Civil Law of Spain*, 105.

17. The testimony shows the corporation, and those under which it claims, possessed the premises up to the uttermost limits of the Morand possessions bordering on Griffon's line, since April, 1775, without interruption.

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18. A reference to the births and deaths of the children and descendents of Charles Morand, senior, as proved in the record, will show that the prescription of thirty years has run against all the plaintiffs.

MATHEWS, J. delivered the opinion of the court.*

In this case, the plaintiffs, as heirs to the succession of their ancestor, Charles Morand, sen. claim a tract of land, situated in the angle formed by the bayou-road and the then outward limit of the city of New-Orleans, now Rampart street, extending from the said road leading to the bayou St. John, along Rampart street, to the south corner of the public square where formerly stood fort St. Ferdinand, and back from said corner fourteen arpents, by ten on the north-eastern limit, &c.

The defendants deny the allegations in the petition, and set up title in themselves, as derived through several *meuse* conveyances from the same person under whom the plaintiffs claim.

Judgment being rendered in the court below in favor of the former, the latter appealed.

The evidence of the case shows, that Charles Morand, sen., was, at the time of his death, the grantee and owner of several tracts or parcels of land, situated on the road of the bayou St. John, on both sides, and fronting on the rear limit of the city. These tracts were adjoining to each other, in such a manner as to be capable of forming, together, one consolidated plantation or farm. The grantee and owner, at and previous to the time of his death, made his residence and had his principal establishments, near to the bayou-road, and on the left side thereof in going from the city to the bayou St. John. On this side is situated the tract called the *Briqueterie*, which he had acquired by purchase from the

* This opinion was pronounced at the last June term, on the principal questions involved in the case; and the following one was pronounced at the present term, on the question of prescription, as to part of the tract in dispute.

French West India Company in 1731; adjoining thereto, and between it and the limit of the city, he obtained, by concession from the French government, in June 1756, a triangle of land containing eleven superficial arpents. In the same manner and at the same time, he acquired another tract, adjoining the Briqueterie, and fronting on the city, (in the greater extent of its front,) on the right hand side of the bayou road, and extending to a certain depth on a line parallel to the side line of the tract which he had purchased from the Company of the Indias, &c. The land now in dispute, is situated on the base of the triangular tract, and may extend into that which was acquired under the name of the Briqueterie.

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In the month of October, one thousand seven hundred and fifty-six, the owner of this property died, leaving as his heirs four children, all minors. In November, of the same year, an inventory was made of his succession, in which were noted, amongst other things belonging thereto, several of the title papers of the deceased, &c. The plantation on which he resided is mentioned in the inventory, but seems not to have been appraised.

In the investigation of this cause, it is deemed unnecessary to notice any other proceedings which took place, relating to the succession of the deceased, until February, one thousand seven hundred and seventy-two, at which time an inventory and appraisement were made of it, with a view to a sale and partition amongst the heirs. In pursuance of the intention to partition the estate, it was sold at auction, and on the 7th of April, one thousand seven hundred and seventy-two, Charles Morand, the son and one of the heirs of the intestate, became the purchaser, by regular adjudication, of the principal plantation or farm, together with its appurtenances, which belonged to the succession of his father, situated on the bayou road where it leaves the city, (*finca y habitacion sita a la salida de esta ciudad, en el camino del bayou.*) This adjudication took place in reference to the inventory which had been made in the month of February preceding, in which the plantation is described in the following manner:

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"Dier arpanes que dixieron tener d'ha tierra en frente de la ciudad, sobre el fundo de siete, que corren sobre el camino del d'ha bayou, en donde estan la casa principal, &c. y sobre treinta y dos de fundo del otro lado del camino," &c.

As both the parties to this action claim title, immediately or mediately, from the original grantee and proprietor, no question can be raised in relation to the validity of his title to the land in dispute; and no objection has been made to the *mesne* conveyances by which the defendants acquired title finally from Claude Tremé, their immediate vendor.

The first question to be decided, relates to the location and quantity of the land which was transferred to Charles Morand, jun. under the adjudication to him of the plantation (*finca y habitacion*) which belonged to the succession of his father, as described in the proces-verbal.

We have already seen how this plantation was defined and limited, by the description contained in the inventory, in reference to which the sale was made. The persons who officiated in making that instrument, said that it contained ten arpents front on the city, with seven in depth, which run on the bayou road, &c.

But, according to the delineations of the plans of survey, made to aid in the examination of the respective claims and pretensions of the parties now litigant, it is discovered that the three tracts of land which belonged to the estate of Morand, sen. and which fronted, in the greater part of their extent, on the city, have a front of fourteen arpents, of which about three on the right hand side of the bayou road, did not touch the limit of the city, at the time the inventory of 1772 was made; as the city did not then extend so far as the entire front of the lands granted to the original grantee, and acquired by purchase in 1756 and 1731.

The adjudication having been made of an entire plantation, and for a whole sum as the price, it is admitted that it partakes of the nature of a sale *per aversionem*, whether it be such, or not, we deem it useless to inquire.

Where a plantation was sold as containing ten ar-

Leaving, therefore, out of view, the authority cited to show the legal consequences of a sale of that kind, as being unne-

cessary to support the pretensions of the defendants, we are of opinion, that Charles Morand, jun. under whom they claim, acquired title, by the adjudication made to him in April, 1772, to ten arpents fronting on the city, with a depth of seven, running on the base line of the triangular tract, and continuing, for quantity, on the upper or south-western line of the tract of the Briqueterie, and a depth of twenty-two on the right hand side of the bayou road.

This opinion is formed in accordance with our understanding of the description given of the plantation, in the inventory of 1772, and the terms of the final adjudication of it, in the month of April of that year; and of the plans or plats of survey, made in conformity to the grants, &c. of the *locus in quo*.

It is contended by the counsel of the plaintiffs, that in order to satisfy the call for the side line of seven arpents in depth, a point must be assumed on the rear limit of the city, from which the distance required will reach the bayou road at the place where the principal house occupied by the original proprietor of the plantation, in his life time, was situated.

To such a construction as this, of the terms used in the inventory, we are unable to give our assent. It is true, that the persons who were engaged in inventorying and appraising the property of Morand's succession, seem not to have referred, specifically, to the plans of the different tracts of land which constituted the entire plantation on which the deceased had resided, and which was adjudicated to his son. They, however, describe it as having ten arpents in front of the city, on a depth of seven, which run on the bayou road, where are the principal house, and other buildings, and improvements.

This inventory was made with a view to the partition of the estate of the deceased amongst his heirs; and it may fairly be presumed, that the intention of those who were engaged in the partition, was to sell the whole of that estate in such parcels as might facilitate the adjudication, and procure a just price for the property. It cannot be believed, that

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Arpents fronting on the rear limit of the city of New-Orleans, with seven in depth which run on the bayou road, and the *locus in quo* was found to measure fourteen arpents in front, of which three, on the right side of the road, going to the bayou, did not touch on the then limit of the city, the vendee was decreed to take ten arpents in front, beginning at the corner of the tract left of the bayou road, with the corresponding depth.

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If in the description under which a plantation is sold for partition among the heirs and co-proprietors, there are words of a doubtful import, they must be construed so as to refer to a sale of the entire plantation.

they intended, by the description given of the principal plantation, to divide it into two or more parts, or parcels, and sell one only, leaving the others to be disposed of at a future time, or retained for the heirs. This, however, would result from the pretensions of the plaintiffs, if their views must be carried into effect. The purchaser of this plantation bought it as having ten arpents fronting on the rear of the city, &c., and seven in depth on the left side of the bayou road, to run on said road, not to run to it. The word used in the inventory is *sobre*, not *hasta*, which should have been used if it had been intended to fix the principal house on the road, as the terminating point of this line. But it is impossible, according to the designation of the inventory, which gives ten arpents to front on the city, that this number can be had, unless the side line given as one of the limits of the plantation, be run from a point on the front limit at a considerable distance from the place where the bayou road leaves the city, and to the left of said road. This side line cannot, therefore, coincide with the road. The terms of the inventory, however, require it to be run on the road; but to run it immediately there, would destroy the call for ten arpents in front; therefore, this line cannot, with propriety, be thus run: and it would be equally inconsistent with the description of the inventory, to run it from a point, arbitrarily assumed, on the limit of the city, to terminate on the road at the distance required, because such a direction or course is not designated in that instrument, and would be wholly in opposition to all the plans of survey made in conformity to the various grants of the tracts of land which constitute the plantation sold. This line should, in our opinion, commence at a point on the limit of the city, which will give to the purchaser ten arpents front on said city, and run in a direction as nearly parallel with the bayou road, as the courses of the tracts of land which constitute the plantation bought, will permit. The buyer was bound, according to the terms of the inventory and adjudication, to take ten arpents front on the city; to obtain this number of arpents, one extreme or other of the grants fronting on the place designated, must be assumed as a point of beginning, and the most proper of these extreme points, ap-

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pears to us, to be that which gives the whole front, as called for, on the city; and this we believe to be, according to the plans exhibited in the case, the base line of the triangular tract, at the point where it touches the city. It is pretty evident, from the testimony of the cause, that a line drawn as contended for by the plaintiffs, would not include all the improvements which were on the plantation at the time of its sale.

The circumstance of the *mesne* proprietors having executed acts of ownership, more particularly in relation that part of the plantation situated on the right hand side of the bayou road, cannot, in our opinion, be opposed on any just principles of interpretation, to the construction which has been given to the terms of the inventory and adjudication. Title to property, and possession or acts of ownership, are distinct things; the latter does not imply the former; but the former may always induce the latter, whenever individual rights can be enforced by judicial authority. The title, as acquired under the adjudication, and which has been regularly transferred to the defendants, cannot be affected by the manner in which the intermediate proprietors possessed and used the land, plantation *finca y habitacion*, or by whatever name the thing sold may be called. Neither can the title thus acquired be affected by the occupancy of part of it as a public fort, or fortification, except so far as such occupancy might operate to prevent acquisition of title by prescription.

It must be admitted, even in support of the rights claimed by the plaintiffs, that Morand, sen. was the lawful proprietor of all the land immediately in the rear of the city, and up to its limit, in that quarter which was embraced by his several grants and purchase from the West India Company. Consequently no question can be usefully raised, in the present case, as to the true meaning of the words *frente* or *face*. The legal import of these terms, as used in concessions and sales of land in this country, was much commented on in the multifarious suits, relating to the alluvion in front of the suburb St. Mary, heretofore determined by the tribunals of the late territorial government, and those of the state; and it is believed, that these words (although they may occasionally be merely descriptive,) generally carry grants of land to the

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The title to a tract of land, acquired by adjudication, and which has been regularly transferred to the present occupant, is not affected by the manner in which the intermediate proprietors possessed and used the land, except so far as prescription may be interrupted.

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object designated as the front, &c., where nothing intervenes to prevent this effect.

If any part of the *finca y habitacion* which belonged to the succession of Morand, the father, did not pass by the adjudication to his son, it was that part which did not front on the city at the time of said adjudication, and any quantity adjacent thereto, necessary to curtail the whole front so as to leave ten arpents. This part, however, is not claimed in the present action.

We deem it useless to notice very particularly, the contest raised in the course of argument, relative to the signification of the Spanish words *finca y habitacion*, and the French word *habitation*; for, if it be admitted, that the latter alone would not convey the idea which, in English, is attached to the word plantation, yet, when united, they certainly mean something more than a mere house for dwelling in. The term *habitation*, in the French language, seems to have been used in some of the colonies of that government, to convey the idea of what is called, in English, a plantation or farm; and it is shown, by many examples cited by the counsel for the defendants, that the same word *habitacion*, in Spanish, has been frequently used by the officers of the Spanish government, after the acquisition of Louisiana from the French king, in the same manner as it had been previously used in the colony by the first proprietor. And this must evidently be the manner in which it was used in the present instance, or we should have a dwelling place or house, described as having ten arpents in front. *Usus est arbiter linguæ*; and words, though of various significations, must always be received in that sense which renders most intelligible writings containing them.

Being of opinion that Charles Morand, jun. acquired title to the land in dispute, by the adjudication of 1772, and that the title thus acquired has been regularly transferred to the defendants, it is unnecessary to examine any other question in the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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MATHEWS, J. delivered the opinion of the court.

The principal questions in this case have already been settled by a judgment of the appellate court, rendered in June term, one thousand eight hundred and thirty-two. That judgment was in affirmance of the one rendered by the District Court, which adjudged to the defendants all the land which they held and possessed, under a title from Claud Tremé and his wife, their immediate vendors. The act of sale under which Tremé and wife acquired title, describes the property sold (which was a tract of land) by limits, and is consequently a sale *per aversionem*. The tract thus purchased, was composed of several distinct tracts, or parts of them, which originally belonged to the ancestor of the plaintiffs, Charles Morand, sen., and was adjudicated to his son Charles, at the sale of his succession, by quantity, not by fixed limits. The dispute between the present parties, relates solely to one of those original tracts, that is known by the name of the Brick Yard, which is situated on the left hand side of the road leading from the city to the bayou St. John, and which was described in the adjudication to Charles Morand, the son, as having about seven arpents in depth, running from the city, on, or parallel with the bayou road. He afterwards sold it to Paul Moreau, under the following description: "*Una tierra de como diez arpanes de frente a la ciudad sobre el fundo de siete que corren sobre el camino del bayou de San Juan, &c.; lindada de un lado a la tierra de dos arpanes pertenentes a Dn. Louis Docmini, y del otro a la ciudad,*" &c. The limits thus given embrace considerably more than seven arpents in depth, extending to the tract of land which formerly belonged to Doquemenil Morand, now the property of Griffon. As Charles Morand, the seller to Moreau, had acquired no title to any land beyond seven arpents in depth, running from the city, by the adjudication of his father's succession, it is clear that he could not legally convey any to his vendee. The land beyond these seven arpents, and

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extending to the limit of Griffon's plantation, is now the only remaining subject of dispute between the parties to this action, and it offers a single question for solution; that is, whether Moreau, and those claiming under him, have acquired title by prescription. Two kinds of prescription are relied on by the defendants, *longe and longissime temporis*. The facts of the case would perhaps not fully support the latter, notwithstanding a possession, or occupancy and use of part of the premises, since the year one thousand seven hundred and seventy-five, until the commencement of the present suit in one thousand eight hundred and thirty. We are however of opinion, that the defendants have a right to the benefit of the former.

For the prescription of ten and twenty years, there must be an uninterrupted, bona fide possession, and a title translatif of property or a contract or deed under which the party is put in possession.

To give effect to the prescription of ten and twenty years, three things are required by our laws. A just title, possession and good faith. The leading principles of the Spanish laws, which govern the present case, do not differ materially from the French. The systems of jurisprudence of both countries, it is believed, are mainly founded on the Roman Civil Law. In relation to the three requisites above stated, as necessary to give title by prescription, we do therefore refer principally to the definitions and doctrines found in Pothier's treatises on possession and prescription, these subjects being therein treated in a perspicuous manner, with copious references to the laws on which the doctrines of the author are based.

A just title of possession, is one translatif of property or a contract or deed, in consequence of which any person is put in possession of a thing. *Pothier Prescription, no. 51.* Titles of this nature are of various kinds as *pro emptore, pro herede, &c.* In the present case, the defendants claim the benefit of a title *pro emptore*, and the main basis of their claim is the act of sale from Charles Morand, the son, to Paul Moreau, passed on the 25th April, 1775. We have already transcribed from this deed, the clauses relating to the description of the property sold. By these extracts from the act of sale, the description of the land gives the depth of seven arpents, running on a parallel with the road of the

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nite price is sale
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bayou St. John. But it also gives as a limit in the rear, the land of Doquemenil Morand, now the plantation of Griffon. Under this description, and with a knowledge of the *locus in quo*, as it was situated in relation to the adjoining plantations, which the vendor and vendee may be presumed to have possessed, the latter may well have considered that he was buying a tract of land according to limits, and not agreeable to quantity; the price paid being a total and fixed sum for the whole tract, and not so much per arpent; and that the seller intended to sell the whole tract, back to the land of Doquemenil Morand, cannot be doubted. The entire tract having been sold by limits, for a whole and definite price; these circumstances must control the problematical description as to quantity, and give to the sale the character of one *per aversionem*. 4 N. S. p. 428.

This title was clearly translativ of property to the whole extent of the limits given in the act of sale, and the evidence shows that the vendee took possession under the sale, and although the record affords no proof of a formal delivery to him of the thing sold, yet neither is there any evidence that the possession assumed was contrary to the will of the vendor. It must, therefore, be considered as a civil possession *pro emptore*, extending over the whole of the tract of land, as sold by limits. In order, however, that title by prescription might grow out of this possession, it is necessary that it should be *bona fide*, and uninterrupted during the time required to prescribe.

Against the good faith of the possessors in the present instance, the plaintiffs rely on that part of the act of sale, which states the manner in which the vendor had acquired title to the property sold, wherein it is declared that he acquired it by adjudication of the property which belonged to his father, and which was sold at public sale, &c. By that adjudication, it is contended that the purchaser acquired title to only seven arpents in depth, and consequently if his vendee had used ordinary precaution and diligence, he would have discovered that the person from whom he bought had no title beyond these seven arpents. Except this reference in the act of sale, from Charles Morand to Paul Moreau,

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there is no proof showing that the latter knew the defect of the title of the former; and this is a simple statement, that the tract of land sold, had been acquired by adjudication at public sale of the succession of Charles Morand, the elder, without indicating any place where the notarial proceedings might be found. In this respect the pretensions of the plaintiffs rest on a foundation weaker than that relied on by *Fletcher's heirs*, in their suit, *vs. Cavalier, et. al.* For in that case, the reference to the original title under which the defendants held, indicated the notarial office where it was to be found; it was deficient in the formalities required by law, and consequently did not afford evidence of a title justly translativ of property. That case is clearly distinguishable from the one found in 2 *N. S. p. 618*, and the distinction is made evident by the last opinion pronounced in *Fletcher's* case, wherein it was held, that the means indicated of obtaining knowledge of facts, is not equivalent to actual knowledge. We perceive no good reason to consider the doctrine thus established, as erroneous, nor is it impugned by that laid down in the case cited from 4 *N. S. p. 224*.

The good faith which ought to accompany possession is defined by Potheir to be, *justa opinio quesiti dominii*.

Paul Moreau might fairly (according to the limits given in the sale to him,) have entertained the belief, that he acquired title to the tract of land sold as far as the boundary of the plantation now owned by Griffon, there being no evidence to show that he knew that any part of it belonged to any other person at the time when he took possession under the sale; nor is there any testimony showing that the good faith which commenced with his possession, ever afterwards ceased to operate on the minds of those who succeeded to his rights, either by titles, universal or particular, down to the present defendants. The possession under the title to Moreau being what is denominated a civil possession, extended over the whole tract sold, according to the limits specified; and the testimony of the case shows that he and those claiming under him, fenced and used the land along the bayou road, to the line of Griffon's plantation. See the testimony of Melin, Pegeau, Griffon, Lambert, Ducourdeau, and others.

But it does not suffice to acquire title under the law of prescription that the possession of property should be under color of title, and in good faith. It must also be continuous or uninterrupted during the whole time required to be completed to operate a title.

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The only pretence of interruption in the present case is given by the circumstance of a fort being placed in a situation which required the shot from the cannon to pass over a part of Moreau's tract of land. The site of this fort was not on any part of the ground now in dispute; nor is it pretended that the guns bore directly on the dwelling of the possessor, or that he was necessarily removed from his habitation. So long as he occupied any part of his plantation, his civil possession extended over the whole. We do not believe that the mere circumstance of a man's land being so situated in relation to a fortification, as to require the balls from the guns to pass over it, ought to be considered as an interruption of possession. It certainly cannot be classed under the head of civil interruptions. And it seems to us to be a use of the thing, or temporary servitude on it, not incompatible with the possession of the person who has just cause to believe himself the proprietor, and is, therefore, not what may be considered as a natural or actual interruption.

So long as a person occupies a part of his plantation, his civil possession extends over the whole.

The situation of a tract of land so that the balls from the guns of a fort must pass over it, is insufficient to interrupt possession.

We, therefore, conclude that the defendants, and those under whom they claim, and from whom this title has been regularly derived, have had open, peaceable and uninterrupted possession under a title *pro emptore*. And the only question which remains to be settled is, whether this possession has continued a time sufficient to acquire a title to the premises in dispute, by the prescription of ten and twenty years. The plaintiffs are descendants from four branches, whose stock was Charles Morand, senior, being his children, three sons and a daughter. The evidence shows that all these, the children of Morand, the elder, lived more than twenty years after they became of age; consequently, the prescription *longi temporis* had its full effect before their deaths.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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RICARD'S HEIRS vs. HIRIART, ET AL.

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APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

An affidavit, attesting the truth and correctness of the facts and allegations in the petition which render an injunction necessary, is insufficient to authorise the court to issue one.

On the dissolution of an injunction, the fee of the defendant's attorney may be allowed as special damages.

This action was brought to enjoin the sheriff and the plaintiff in another suit, from all further proceeding on a *feri facias* which had been issued in that suit, and for a decree extinguishing a certain promissory note.

The curator *ad bona* of one of the plaintiffs, who are the minor heirs and children of Marie Louise Cleotilde Ricard, and the tutrix of the others, as the affidavit states, "being duly sworn, say that the facts and allegations contained in the above petition, and which render an injunction necessary, are true and correct." The bond required by law was given, and the prayer for an injunction granted.

The defendants moved the court to dissolve the injunction on the face of the papers, and pleaded *res judicata* to the demand in the petition. They demanded twenty per cent. damages on the amount enjoined, and one hundred and fifty dollars as special damages.

The inferior court sustained the motion, and condemned the plaintiffs and their surety, to twenty per cent. damages, with the taxed costs, and seventy-five dollars as special damages, being the value proved of the services of defendants' attorney in this suit. The plaintiffs appealed.

Labauve, for appellants.

I. The judgment below is erroneous.

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2. The plaintiffs' petition contains a sufficient showing to sustain the action.

3. The defendant entirely failed to establish his plea of *res judicata*. *Civil Code*, art. 2265.

4. The facts stated in the petition are taken for true on the motion to dismiss the injunction. 8 N. S. 395.

5. This is clearly an action in nullity, giving rise to an injunction; 2 *La. Rep.* 137; the result of which would virtually cancel the mortgage. *Civil Code*, art. 3251-2, 3339.

6. The plaintiffs were wrongfully condemned to damages. *Ricard's heirs vs. Hiriart*. Attorneys' fees are not especial damages in the meaning of the law; there is no proof of damages as contemplated by the law.

7. The security on the bond was wrongfully condemned to cost.

Burke and Davis, for appellees.

1. The proceedings of plaintiffs are informal. *Code of Practice*, art. 298, no. 7. *Ibid.* art. 304.

2. This petition is bad and insufficient in law. *Code of Practice*, art. 548.

3. The judgment enjoined has the force and effect of the thing adjudicated. *Code*, art. 3522, no. 9. *Case of Ricard's heirs vs. Hiriart*, January term, 1832. *Code of Practice*, art. 889. *Act of April 7, 1826*, sec. 12.

4. The prayers of the petition cannot be granted to plaintiffs in this suit. *Code of Practice*, art. 615.

5. Twenty per cent. interest as damage should be allowed. *Act of March 25, 1831*. *Code of Practice*, art. 888.

6. The appeal is frivolous and taken for delay. *Code of Practice*, art. 907.

MARTIN, J. delivered the opinion of the court.

The defendants prayed for the dissolution of the injunction on the ground, that it appeared from the face of the papers, that it was wrongfully issued without proper showing, and on the plea of *res judicata*.

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The injunction was dissolved; the plaintiffs and their surety were decreed to pay ten per cent. for general, and seventy-five dollars for special damages and costs. They appealed.

The defendant prayed for an amendment of the judgment by an increase of the damages to twenty per cent. interest, and damages for the frivolous appeal.

The plaintiffs contended that the injunction ought not to have been dissolved; and as they were not parties to the judgment, the execution of which they had enjoined, damages ought not to have been given against them or their surety.

The affidavits on which the injunction was obtained, attested the truth and correctness of the facts and allegations in the petition, which rendered an injunction necessary.

An affidavit attesting the correctness of the facts and allegations in the petition which render an injunction necessary, is insufficient to authorise the court to issue one.

The present case cannot be distinguished from that of *Hebert vs. Joly, et al.* determined in last January term. It was there held, that such an affidavit is absolutely insufficient to authorise an injunction.

We think the general damages were properly allowed; because there is a second injunction to arrest the judgment of the present defendants; and because on the second injunction the present plaintiffs were reconvened as debtors of the present defendants, in their capacity of heirs.

The party who claims an injunction, must state in his petition the facts which render an injunction necessary. *Code of Practice.* This means all the facts then existing, otherwise he might successively claim sundry injunctions on the score of payment, release, compensation, and the like.

On the dissolution of an injunction, the fee of the defendant's attorney may be allowed as special damages.

The fees of the attorney were properly allowed.

We do not think that the court below erred in not allowing the maximum of general damages; nor that we ought to give any for the frivolous appeal.

The Act of 1831, page 102, requires judgment to be given against the surety.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

M'DONOUGH vs. ZACHARIE.

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APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE

THIRD PRESIDING.

The condition, on the fulfilment of which depends the right to demand payment of an obligation, must appear, by positive proof, to have been fully performed, before payment can be demanded.

Although the performance of an act has been duly registered, so as to operate legal notice to all persons, it is insufficient notice to a person to whom another is bound to make known the fact of the performance.

This suit was brought for the payment of thirty-seven thousand eight hundred and thirteen dollars, with interest at six per cent, by a seizure and sale of a plantation situated about thirty leagues above the city of New-Orleans, on the right bank of the Mississippi, and fifty-four negroes, in the possession of the defendant.

On the 23d of January, 1818, the plaintiff, by public act, sold this plantation, and thirty of the negroes, to John T. Pemberton, for one hundred and twenty-five thousand dollars, of which twelve thousand dollars were paid at the sale, and for the balance, the vendee executed his ten promissory notes, payable to the order of the vendor, on the last day of March, in each succeeding year, each for the sum of eleven thousand three hundred dollars, with special mortgage for their payment, on the property sold.

On the 27th of March, 1821, Pemberton sold to Joseph Erwin the plantation and fifty-four slaves, including those he had purchased from the plaintiff, with special mortgage for the balance then due the plaintiff, to wit: ninety thousand four hundred dollars.

On the 10th of October, 1821, Erwin sold the property he had thus purchased to Mrs. widow Zacharie, with special mortgage for the balance then due to the plaintiff, to wit: the sum of seventy-nine thousand dollars.

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Mrs. Zacharie soon afterwards died; the plantation and slaves were sold at public auction by order of the parish judge, in order to effect a partition among the heirs, and the defendant became the purchaser.

The defendant opposed the order of seizure, averring that he was disquieted in his possession of the premises, by a suit of eviction and the non-performance by plaintiff, of a condition precedent in the obligations which the plaintiff sought to enforce.

The order of seizure which had been obtained was enjoined, and on motion to dissolve the injunction the plaintiff offered security, to which the defendant filed several exceptions.

The court after hearing testimony and argument, decided against the defendant as to the interest claimed, and ordered the injunction to be dissolved, on the plaintiff giving certain security. The defendant appealed.

MATHEWS, J. delivered the opinion of the court.

This action commenced by an order of seizure and sale of certain real estate and slaves, described in the plaintiff's petition, and alleged to be subject to a mortgage made in his favor, &c. The order of seizure was granted on the 10th of May, 1832. To this proceeding the defendant (who is the third possessor) filed his opposition and answer, and obtained an order to suspend and enjoin the order of seizure, until further order of the court.

On these pleadings, and the evidence adduced, the case was tried in the court below, and judgment being rendered in favor of the plaintiff, the defendant appealed.

The property ordered to be seized, is a plantation and slaves, which were sold by the plaintiff, to John T. Pemberton, in the year 1818. In the notarial act of sale, a special mortgage on the property sold, was stipulated in favor of the seller. Pemberton, afterwards, viz: on the 27th of March, 1821, sold the same property to Joseph Erwin, together with some additional slaves, amounting in all to fifty-four. This sale was also made by public act, and it was stipulated

between the parties, that the purchaser should pay the balance of the price then owing from Pemberton, to M'Donough, the original vendor, according to the clauses, stipulations and agreements contained in the act of sale, by which the property had been conveyed to Pemberton. On the 1st of October, 1821, Erwin sold and conveyed by notarial act, to Mrs. Zacharie, the mother of the defendant, all the property which he had acquired by the sale from Pemberton. In this act, the balance of the price unpaid to M'Donough, is fixed at seventy-nine thousand one hundred dollars. He intervened in this act of sale, and the vendee took on himself the payment to him, of the sum thus ascertained to be owing on the original sale, and Erwin was released from his obligations to the intervenor, which arose out of the contract of the former with Pemberton. In this instrument is found a clause of mortgage on the land and fifty-four slaves, stipulated in favor of M'Donough, to secure the payment of the balance of the price owing to him.

Mrs. Zacharie died in 1830, and the property now in dispute was regularly sold by order of the Court of Probates of the parish wherein it is situated, as a part of her succession. At the probate sale, the defendant became the purchaser under an express stipulation, that he should comply with the conditions, and fulfill the obligations imposed by the three contracts of sale already recited. The price agreed to be paid by Pemberton to M'Donough, was divided into instalments, payable at different times, the whole payment to be completed on the 31st day of March, 1828. In order to come to a just conclusion on the decision of the case, it is only necessary to ascertain the obligations resulting from the clauses and stipulations in the original act of sale from the plaintiff to Pemberton, for all the subsequent acts of sale and transfer of the property, contain express reference to these clauses and stipulations. As we have already seen, the balance owing at the time Mrs. Zacharie became the purchaser of this property, was seventy-nine thousand one hundred dollars. This sum was payable in seven equal instalments, of eleven thousand three hundred dollars each, the

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first on the 31st of March, 1822, and annually from that period until 1828, when the last became due.

Promissory notes were made by the purchaser for all these instalments, and paraphed *ne varietur* by the notary. They were originally ten in number. Three of them were paid off and fully discharged, previous to the sale to Mrs. Zacharie. The act of sale from M'Donough to Pemberton, contains a stipulation by which the purchaser, in the event of failure of crops, was permitted under certain conditions to retard the payment, by paying interest at the rate of six per cent. per annum, on the sums which should remain unpaid after the time at which they became due; and he agreed to pay interest at this rate, on the five last instalments, to be calculated from the 31st of March, 1823. In relation to these instalments, the act has a clause expressed in the following terms: "*D'apres le certificat du conservateur en cette ville en date de ce jour il y a diverses hypothèques tant general que speciale enregistrées contre le sieur vendeur, et qui frappent le bien presentement vendu; mais les parties apres avoir pris connaissance et lecture du dit certificat l'ont signé ne varietur, avec du dit notaire et temoin pour icelui, rester annexé aux presentes; et sont expressement convenus entres elles que le sieur vendeur sera tenu de faire degager et liberer le bien presentement vendu de toutes les hypothèques, et d'en justifier au sieur acquereur avant le payement que ce dernier doit faire sur le prix de la presente vente le dernier mars de l'année 1824, a défaut de quoi le dit sieur acquereur sera bien duement autorisé a suspendre et refuser tous les payemens qu'il s'est obligé de faire sur le prix de la presente vente a partie de celui de l'année mil huit cent vingt quatre inclusivement.*"

The most important question in the case, arises out of the construction to be given to this clause, and on the weight which should be given to the evidence adduced, to show a compliance on the part of the plaintiff, with the obligations thereby imposed on him. As to the two first of the notes, of which the payment was assumed by the ancestor of the defendant, and by him also according to the conditions of the probate sale, by which he acquired title to the mortgaged

premises, there seems to be no dispute with regard to interest which accrued after they were due. Large sums were paid and credited on them at different dates during the life time of Mrs. Zacharie, still, however, leaving a balance owing and due, on which interest must be calculated down to the time when the defendant was interrupted in his possession, by a suit brought against him by the heirs of Belly, the person under whom the plaintiff claimed title to the property, which is the subject of the present dispute. This suit was commenced by service of citation, on the 20th of June, 1832, and has operated as one of the causes suspending the seizure and sale in the present case. The main ground of defence against the proceedings instituted and carried on by the plaintiff, as alleged by the defendant, is a want of compliance on the part of the former, with the stipulations of the clause of the act above cited, a circumstance which he contends exonerates him from the payment of any interest on the last five instalments, which according to the contract of sale between M'Donough and Pemberton, was to commence from the last day of March, 1823. The solidity of this defence depends on the want of evidence to show that the plaintiff has complied with the conditions imposed on him, relating to the mortgages, both general and special, with which the property sold was encumbered at the time of the sale to Pemberton. It is seen by reference to this clause of the contract which relates particularly to the five last instalments, had a right to suspend and refuse all payments which he was bound to make on the price of the property, from the year 1824, inclusively, on failure of the seller to free it from the mortgages which were specified as existing on it, and to give proof of his having done so to the buyer, (*et d'en justifier au sieur acquereur.*)

The record affords proof that these mortgages were all released before the stipulated time, as appears by a certificate of the recorder of mortgages of the office wherein they had been inscribed, and it further appears from the evidence of the cause, that payments were made by Mrs. Zacharie, and imputed to the discharge of the two notes which became

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due, one in 1824, and the other in 1825. Twelve thousand dollars were paid on account of principal and interest on the first, and eight thousand nine hundred and eighty-seven dollars on account of the second. The first of these payments was made on the 18th of April, 1829, and the second on the 4th of April, 1830.

The mortgages referred to in the act of sale from M'Donough to Pemberton, were not finally released until the month of April, 1823. Consequently the certificates of non-mortgage, found in the subsequent acts of sale from Pemberton to Erwin, and from the latter to Mrs. Zacharie, which were paid, the one in April 1821, and the other in October of the same year, afford no evidence that the stipulations contained in the clause of the original act, were at that time complied with by the plaintiff. But it is true, as above stated, that these mortgages had been cancelled and eradicated previous to the 1st of April, 1824, the period at which the five last annual instalments of the price of the plantation and slaves commenced falling due. There is, however, no positive proof that this fact was made known either to Mrs. Zacharie or the present defendant, previous to obtaining the order for a seizure and sale of the mortgaged property. The condition on which the vendor was authorised to exact the payment of those instalments, does not appear to have been fully performed, for although he had raised the mortgages in proper time, he did not justify to the purchaser, according to the French idiom, that he had performed these acts required on his part, *i. e.* he did not communicate to her evidence to show his fulfilment of the obligations imposed; and until that was done the purchaser was authorised to suspend and refuse payment, in other words she had a right to retain this part of the price, and consequently was not bound to pay interest *ipso facto*, on account of the delay of payment. Admitting that no express proof has been given that knowledge was brought home to the defendant or his ancestor of the eradication of these mortgages, it is still contended that the facts shown by the evidence, raise such a violent presumption of knowledge in both the vendee, Mrs. Zacharie and the appellant, that the

The condition, on the fulfilment of which depends the right to demand payment of an obligation, must appear, by positive proof, to have been fully performed, before payment can be demanded.

latter was rightfully condemned to the payment of interest as adjudged by the District Court. These facts are the release and cancelling of the mortgages in the office of the recorder, and payments having been made of some of the instalments by the vendee, which she was not bound to make except in the event of knowledge, that these mortgages had been released from the property purchased. The fact of cancelling appearing in the same office where the hypothecations were inscribed, it is said ought to produce the same legal effect as the recording does; that is notice to every person, and consequently so far as it operates on the rights and privileges claimed on the part of the defendant in the present instance, he must be presumed to have been conusant of this fact, and also all the other vendees.

What effect this reasoning might produce on our minds if the terms of the clause of the contract which we are now considering, did not embrace two stipulations: First, that the mortgages should be cancelled; and secondly, that the fact of cancelling should be made known to the purchaser, both necessarily to be done by the seller; we deem it unnecessary to declare, as there is no evidence to show that the obligation imposed on him by the latter stipulation has ever been fulfilled. Neither, in our opinion, does the circumstance of partial payments having been made, raise such a presumption of knowledge in the vendees as to dispense the vendor from his obligation to communicate the fact of cancelling before he could enforce these obligations to pay. The payment made was a voluntary act and ought not to be construed so as to injure the rights of the party secured by express agreement. It might have been done under a full confidence of the ability of the obligee to make amends for any damage they might possibly have incurred by their incautious act.

We have said that the delay to make payment of the last four instalments, did not of itself impose an obligation on the purchaser to pay interest in consequence of such delay, as she had a right to refuse payment and retain the amount of these instalments, in consequence of the seller having failed to give notice of the eradications of certain mortgages which

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affected the property sold. But an unconditional promise was made to pay interest on this part of the price at the rate of six per cent. per annum, from April 1, 1823, on the principal sum contained in each of the notes given, until by their terms they respectively became due. The privilege granted to the vendee to retain these instalments as stipulated in the clause of the act of sale, so often referred to, was a right to suspend and refuse the payment of this much of the price of the property, and the interest which was agreed to be paid on these notes down to the periods at which they respectively were due, was as much a part of the price as the principal, and the obligation to pay interest from 1823 down to those periods, was as complete, as it was to pay the principal sums; therefore the defendant cannot be exonerated from the payment of the principal, (which is not pretended,) and we can see no reason why he should from the payment of interest, both having been promised in the same unequivocal manner. The application of the doctrine which authorises debtors to anticipate in certain cases the payment of their debts, to the present case is not easily perceived; in truth we do not think that in justice it can be applied, there having been neither an offer to pay, nor payment by anticipation.

According to the best examination which we have been able to make of the facts of the case, and the law applicable to it, we are of opinion that the plaintiff has a right to recover the balance which remains due on the first two instalments assumed by Mrs. Zacharie, with interest from the periods when they respectively become due at the rate of six per cent. per annum, to the time when the defendant was disturbed in his possession by the suit of the heirs of Belly; and also the principal and interest stipulated to be paid on the last five instalments; that is to say, interest on the first of these instalments from April 1, 1823, to April 1, 1824; interest on the second from April 1, 1823, until April 1, 1825; interest on the third from April 1, 1823, until April 1, 1826; on the fourth from April 1, 1823, until April 1, 1827; and on the fifth, interest from April 1, 1823, until April 1, 1828; on all at the rate of six per cent. per annum; deducting the

amount paid and credited on the instalments to which the payments have been imputed.

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March, 1888.

M'DONOUGH
vs.
ZACHARIE.

The result of calculation according to the principles laid down, shows that there is now owing and due to the plaintiff the balance of the price of the property sold, fifty-two thousand and twenty-eight dollars and sixty-three cents. And as the defendant, according to the terms of the probate sale of his mother's succession, is personally bound to pay this amount, judgment must be rendered against him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendant the sum of fifty-two thousand and twenty-eight dollars and sixty-three cents; and that the mortgaged property in his possession be seized and sold to satisfy this judgment. But no order of seizure and sale shall be issued until the plaintiff give security as directed in the decree of the District Court, allowing to defendant three judicial days, to commence from the first day of the next term of said court to be holden in the parish of Iberville, on the three first days of the term of that court; in which the mortgages and security aforesaid may be filed; and if no exceptions to said security be filed within that period, or if they be filed and overruled, then the order of seizure and sale as above required, shall be issued, &c., the appellee to pay the costs of this appeal; those of the court below to be borne by the defendant and appellant.

SAME CASE.

On an application for a rehearing, the opinion of the court was delivered by MATHEWS, J.

In this case a rehearing has been prayed for, and a request is made that the judgment heretofore rendered by this court should be so altered or modified as to reduce the sum in which the plaintiff is bound to give security before he is permitted to pursue his order of seizure and sale. And it appearing

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BRIGGS.

to the court, that as no substantial grounds were alleged in the petition for the rehearing, and the counsel for the defendant having consented that the judgment might be allowed in this respect, &c. It is, therefore, ordered, adjudged and decreed, that the plaintiff be bound to give security in the sum of sixty thousand dollars instead of the sum decreed by the judgment heretofore rendered; the said security to be given in the manner and under the formalities prescribed in our former judgment, which in this respect had reference to the judgment of the District Court.

Grymes, for appellant.

D. Seghers, for appellee.

COLLINS vs. BRIGGS.

**APPEAL FROM THE COURT OF THE EIGHTH DISTRICT, THE JUDGE OF THE
 THIRD PRESIDING.**

Appearance in court and contesting the cause on any other ground than the want of citation, cures all defects in the citation of appeal.

A party who claims property under a contract, must first show the fulfilment of the condition on which the property in question was given.

This suit was brought by a minor above the age of puberty, assisted by a curator *ad bona* and one *ad litem*. It was a petitory action in which the plaintiff as sole heir of his deceased mother, claimed certain real property situated in the town of Madisonville, and of which the defendant was in possession.

The defendant denied the principal allegations of the petition, and cited in warranty his vendors, who then called Canfield their vendor in warranty.

The cause was tried upon the merits, and judgment was rendered in favor of the plaintiff, from which Canfield appealed. Service of the petition of appeal and citation was

made at the store of the curator *ad bona* of the plaintiff upon his clerk.

EASTERN DIS.
March, 1883.

The plaintiff's counsel moved the court to grant an order for a *certiorari*, directed to the judge of the inferior court, in order to complete the transcript of record, as the clerk had not certified that the transcript contained all the testimony produced in the cause. The appellee resisted this motion because, as he alleged, owing to the great lapse of time, the required certificate could not be obtained. The court overruled the objection, and directed the mandate to be issued as prayed for.

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vs.
BRIGGS.

At the last December term, the appellee moved to dismiss the appeal on the ground that he had not been properly cited in appeal. The court sustained this motion, and dismissed the appeal, but on the application of the appellant, a rehearing was granted; and afterwards the final opinion of the court was pronounced.

Hoffman and Hill, for appellants, contended:

1. That the appearance of appellee in this court and his opposition to the motion for a *certiorari*, amount to a waiver of any imperfection in citation on the appeal.

2. That there is error in the judgment, because no absolute right to the property in controversy, ever became vested in the ancestor of the plaintiff.

3. That it is not shown that the condition of the marriage settlement ever took effect. And if not, the title was never absolutely gone from the vendor of the appellant, until the time of sale.

4. That the plaintiff cannot claim by inheritance or descent, property that never in any way became vested in his ancestor.

5. That if any rights to the property in question ever had vested in plaintiff's ancestor, there was a full renunciation of the same in the act of sale made in this appellant.

I. W. Smith, contra.

PORTER, J. delivered the opinion of the court.

EASTERN DIST.
March, 1833.

COLLINS
vs.
BRIGGS.

Appearance in
court and contest-
ing the cause on
any other ground
than the want of
citation, cures all
defects in the cita-
tion of appeal.

A motion is made to dismiss the appeal in this case, in consequence of the appellee not being legally cited. The objection would, as we have already intimated, be fatal, if the appellee had not appeared in this court, and contested the right of the appellant to obtain a *certiorari* to amend the record on matters independant of the want of citation. The rule has been long settled in this court, that appearance in court, and contesting the cause on any other ground than the want of citation, cures the defect. See 9 *Martin*, 497. 11 *ibid.* 20.

On the merits the case appears to be this. The plaintiff, as heir of his deceased mother, claims the undivided half of a house and three lots of ground in the town of Madisonville, together with fifty arpents of land in the parish of St. Tammany, in virtue of a marriage contract between his mother and one James Tate, made on the 22d of March, 1817. The clause in the marriage contract on which the plaintiff rests his demand, is in these words: "And further, in case the said intended marriage shall take place, in consideration thereof, the said James Tate doth agree to settle on the said Anne, and the heirs of her body to be begotten by the said James, one undivided half of a house and three lots of ground in the town of Madisonville; that is to say, the lot on which the said house stands, and the two adjoining westwardly, to contain one hundred and eighty feet front on the river Tchefuncta along St. Tammany-street, and northwardly one hundred and twenty feet; also fifty arpents of land on the east side of said river, conveyed by J. Laurens to the said Tate, who obligates himself to convey one undivided half of said fifty superficial, together with one half of a tract or parcel of land lying on the east side of Silver creek, held by conveyance from William P. Rose to the said James Tate, and his brother, Thomas Tate, together with the sum of two thousand dollars, at the death of said James Tate, if the said Anne should outlive him, to and for the use of the said Anne, and the heirs of her body; but in case of no issue, or that issue should die before marriage, or the ages of twenty-one, then, and in that case, at the death of said

Anne, the said estate is to return to the heirs of said James Tate; and it is agreed that the aforesaid property and money shall remain for the joint use and benefit of said James and Anne; and the said Tate doth hereby agree and oblige himself, his heirs, executors and assigns, that in case of his death before the said Anne, that they shall in one year thereafter, cause to be conveyed to the said Anne, the above described real estate, to and for her only proper use during her natural life."

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March, 1833.

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BRIGGS.

If children had proceeded from this marriage, it is questionable if the contract would not have contained a substitution, and have been void. But as none such were born, the case may be considered on more obvious grounds. There appears to have been three contingencies contemplated by the parties. The property is given to the wife if she should outlive the husband; if she outlived him and had no issue, or said issue died before marriage, she was to have a life estate; and if there was issue which lived until marriage, then a complete estate vested in them. It is not proved the wife outlived the husband. The condition on which the property was given not being accomplished, the plaintiff can claim nothing under the contract.

A party who claims property under a contract, must first show the fulfilment of the condition on which the property in question was given.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered and decreed, that there be judgment for defendants, with costs in both courts.

EASTERN DIS.
March, 1833.

FOSTER vs. KOKERNOT ET AL.

FOSTER
vs.
KOKERNOT
ET AL.

APPEAL FROM THE PARISH COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

In an action on a *quantum meruit* for work and labor, brought by one of the parties to a contract for that object, signed by him only, the other party may give the contract in evidence to prove the assent of the former to perform the work and labor at the stipulated price.

The facts of the case are stated in the opinion of the court, delivered by MARTIN, J.

The defendants resisted the plaintiff's claim on a *quantum meruit* for work done on their house, on the ground that the plaintiff and Patton undertook to perform the work (for which the plaintiff seeks remuneration,) by a written contract and for fixed prices, and bound themselves to complete it in two months; that they performed part of the work, for which they were paid, and abandoned the house and never came back to complete the rest of the work, for which the defendants claimed damages in reconvention.

There was judgment for the plaintiffs and the defendant appealed.

The record shows that Patton came in and disclaimed any right under the written contract mentioned in the defendant's answer.

Our attention is first drawn to a bill of exceptions to the opinion of the Parish Court, in rejecting the contract just mentioned, offered in evidence by the defendants for the purpose of counteracting the effect of the testimony of witnesses introduced to prove the value of the different pieces of work, by showing the price at which they were to be done, according to the written contract.

The objections to the introduction of this document in evidence were, that it was signed by the plaintiff and Patton, and not by the defendants also; that in this condition, it could not be received as the basis of the defendants' claim;

and therefore it ought not to be available to the defendants, on any other account. Further, that it was inadmissible, because it is evidence of a contract between different parties than those to the present suit.

In our opinion the Parish Court erred. The contract is certainly evidence of the consent of the plaintiff and Patton to perform the work for the prices mentioned; this suffices to render the evidence of this consent; the evidence of a fact from which it may be presumed that the prices were for compensations for the different parts of the work.

As the contract, however, is not conclusive evidence, and may be opposed or supported by other evidence, and the testimony does not enable us to establish the amount to which the plaintiff is entitled, it becomes necessary to remand the case for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and the case remanded for a new trial, with direction to the judge to admit the document mentioned in the bill of exceptions in evidence; the appellee paying costs in this court.

Preston, for appellant.

Roselius, for appellees.

ADAMS vs. RYDER.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A motion for a new trial was properly overruled, where the cause had been fixed on the trial docket by order of an attorney not of record, to the knowledge before the trial of the party making the motion.

EASTERN DIS.
March, 1893.

ADAMS
vs.
RYDER.

In an action on a quantum meruit for work and labor, brought by one of the parties to a contract for that object signed by him only, the other may give the contract in evidence to prove the assent of the former to perform the work and labor at the stipulated price.

EASTERN DIS.
March, 1833.

ADAMS
vs.
HYDER.

The facts of the case are stated in the opinion of the court delivered by MARTIN, J.

This is an action for the rescission of the sale of a slave, attacked with the scrofula; the general issue was pleaded, the facts alleged in the petition were proved, and a physician testified that the disease was, in the opinion of medical men, an incurable one.

There was judgment for the price, with interest from the date of the judgment till paid, and damages to the amount of one hundred and twenty-five dollars. The defendant appealed, after an unsuccessful attempt to obtain a new trial.

The new trial was asked on the ground of the judgment being contrary to law and evidence; the cause was fixed for trial by an attorney not of record; the case was tried *ex parte*. The defendant failed in getting witnesses, notwithstanding he used due diligence.

A motion for a new trial was properly overruled, where the cause had been fixed on the trial docket by order of an attorney not of record, to the knowledge before the trial of the party making the motion.

The first ground was properly overruled. It is not known that the attorney who had the cause set for trial, had not authority from the defendant, who admitted that he had knowledge of the case being fixed for trial, and ought to have attended and moved for a continuance.

On the merits, it has not appeared to us that the evidence does not justify the amount of damages allowed; no specific sum was prayed for as damages, and the only evidence respecting them is, that the plaintiff paid wages for a woman whom he hired to do the work the slave purchased was to have done. The latter was sent soon after the purchase to the defendant who has kept her since. He was then *in mora* as to the reimbursement of the price, and damages ought not in our opinion to have exceeded the legal rate of interest.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of six hundred dollars, with legal interest thereon, from December 28,

1831, until paid, with costs in the District Court, and that they pay costs in this court.

ARMISTEAD
vs.
BOWDEN.

Mercier, for appellant.

Rogers and *L. C. Duncan*, for appellee.

ARMISTEAD vs. BOWDEN.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A sale made in another state of slaves in this, must be registered in this state in the manner required for a sale made here, before it can affect a third party.

McCaleb and *Gray*, for appellant.

1. The property attached was not the property of the defendant, the same being clearly proven to belong to *Indiana Bowden*, the intervening party.

2. The assignment was made and duly recorded before the service of the attachment.

Peirce, contra.

1. The assignment is on the face of it void, and without consideration.

2. The transfer of the slaves was never recorded in the register of conveyances' office, or the office of the parish judge for the parish of Iberville.

The facts are stated in the opinion of the court pronounced by *Porter, J.*

EASTERN DIS.
March, 1833.

YEATMAN
vs.
ERWIN ET AL.

A sale made in another state of slaves in this, must be registered in this state in the manner required for a sale made here, before it can affect a third party.

This action was commenced by attachment, and the case comes before us on an appeal by the intervenors, who set up title to the property attached in the hands of the garnishee.

The appellants claim under a sale made in the state of Virginia, the slaves were not delivered when the attachment was laid, nor was any registry ever made in this state of the conveyance by which they were acquired. The plaintiff, who was a third party to the act, cannot be affected by it, until it was duly recorded here. The slaves were within this state when the contract abroad took place; and it is clear that the conveyance made there cannot have greater effect than a similar one executed within the limits of Louisiana which was unregistered could have. *2 La. Reports, 122.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

YEATMAN vs. ERWIN ET AL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE SECOND PRESIDING.

A commission directed to any magistrate of a county in another state, and executed by a person who calls himself, and is certified by the clerk of the county, to be one of the justices thereof, cannot be read if objected to when offered, but the objection can be taken only at that time.

If notice of protest is shown to have been sent to the endorser at a post office in the parish where he resides, it lies with him to show that there is a nother post office nearer to his residence.

Peirce, for appellants.

1. The commission was not duly executed; there was no proof that Mr. Boss, who executed it was a magistrate.

OF THE STATE OF LOUISIANA.

2. It is not proved that the post office established by law, nearest the residence of defendant was Desobry's post office.

3. There is no such office as Desobry's post office known to the law.

Porter and Eustis, for appellees.

The facts are stated in the opinion of the court pronounced by **MATHEWS, J.**

The defendants are appellants from a judgment on a note endorsed by their ancestor, and they claim a reversal on the ground that a deposition was read, notwithstanding the absence of any proof of its having been made before the proper officer; and that there was no legal evidence of notice of non-payment having been given to their ancestor.

The commission was directed to any magistrate of the county of Wilkinson, in the state of Tennessee; and it appears to have been executed by a gentleman who calls himself, and is certified by the clerk of the court of the county to be one of the justices thereof. It is certain the objection would have been fatal, if the defendants had sought to avail themselves of it, before they suffered the deposition to be read in the first court. But after having refrained to object there, they cannot be allowed to do so here.

A commission directed to any magistrate of a county in another state and executed by a person who calls himself, and is certified by the clerk of the county, to be one of the justices thereof, cannot be read if objected to when offered, but the objection can be taken only at that time.

The letter of the notary to the endorser, enclosing the notice was directed to "Joseph Erwin, Desobry's post office, Iberville, Louisiana." The record shows that Iberville is the parish in which the endorser resided; no evidence was given at the trial that there was another post office in the parish, nor any (in another parish) nearer to his residence.

A new trial was asked on the affidavit of one of the attorneys of the defendants, who deposed that there are two post offices in the parish of Iberville; that the one called by the notary Desobry's, is not established by the act of congress, under that name, but he believes by that of Plaquemine.

It appears to us the new trial was properly denied; no merits were sworn to; it was not stated that the office to

EASTERN DISTRICT
March, 1833.

GASQUET
ET ALS.
vs.
KOKERNOT
ET ALS.

If notice of protest is shown to have been sent to the endorser at a post office in the parish where the defendant resides, it lies with him to show that there is another post office nearer to his residence.

which the letter was directed is not nearer the endorser's residence than the other office in the parish, and it appears the affiant well knew by the designation the office which was intended.

On the merits, we think that when notice is shown to have been sent to an office in the parish in which the endorser resides, it lies with him to show that there is in the parish, or elsewhere, another office nearer to his residence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

GASQUET ET ALS vs. KOKERNOT ET ALS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

In all cases of contracts or promises above five hundred dollars, the testimony of a single witness, without proof of corroborating circumstances, is insufficient.

In a suit on an alleged promise to pay the debt of another, the defendant may show that he has, several times about the period of the alleged promise, refused to pay the other's debts due to other persons, although the plaintiff in making out his case has not attempted to prove the reverse.

Preston, for appellants.

1. But a single witness supports the contract on which the defendant is sued, and he is unsupported by circumstances.
2. It is a contract against which the presumption of law exists. It is opposed by circumstances, and the testimony of of three witnesses.

3. The District Court erred in excluding evidence from the jury, which should have been admitted.

Ex parte Dis.
March, 1881.

Conrad, for appellees.

GRANT
ET AL.
VS.
KOKERNOT
ET AL.

1. The verdict of the jury was correct.

2. The evidence referred to in the bills of exceptions was improperly excluded; because, in itself, it affords no presumption that the defendant did not agree to guarantee this particular debt, or at least so near to a presumption that a jury would attach no weight to it; and because it is admitted that subsequently to the original agreement on which this suit is founded, she did agree to guarantee this particular debt, provided a prolongation of time were allowed her without interest.

The facts are stated in the opinion of the court, delivered by **MATHEWE, J.**

This suit was commenced against **D. L. Kokernot**, as purchaser of certain merchandise from the plaintiffs; also against widow **Kokernot & Son**, united in a commercial firm; and likewise against the widow, in her individual capacity. The petition charges the two last parties as sureties, or guarantors of the purchaser of the goods.

The whole case was submitted to a jury in the court below, who found a general verdict for the plaintiffs, and judgment being thereon rendered for the sum of one thousand four hundred and ten dollars and thirty-one cents, the defendant widow **Kokernot**, appealed.

The testimony of the case fully establishes the fact of the purchase and delivery of the merchandise to the defendant, **D. L. Kokernot**. The record affords no evidence of any assumpsit of guaranty or suretyship on the part of **Kokernot & Son**, as a commercial company; and the assumpsit alleged against **Mrs. Kokernot**, is positively proven by one witness, and proof of corroborating circumstances, which were probably sufficient to produce conviction on the minds of the

EASTERN DISTRICT
March, 1893.

GASQUET
ET AL.

VS.
ROBERT
ET AL.

In all cases of contracts or promises above five hundred dollars, the testimony of a single witness, without proof of corroborating circumstances, is insufficient.

In a suit on an alleged promise to pay the debt of another, the defendant must show that he has, several times about the period of the alleged promise, refused to pay the other's debts due to other persons, although the plaintiff in making out his case has not attempted to prove the reverse.

jury, that this defendant did assume the obligation to pay to the plaintiffs as alleged in this petition.

The exception in favor of contracts between merchants, in relation to mercantile dealings, made in the old *Civil Code*, by which such contracts above five hundred dollars, might be proven by a single creditable witness, not having been introduced in the *Louisiana Code*, is verbally repealed; and now in cases of contracts or promises, having for their object more than five hundred dollars, the testimony of one witness alone does not suffice to establish such contracts without proof of corroborating circumstances. *Louisiana Code*, art. 2257. In the present instance, proof of this kind was adduced, and as the jury were the proper judges of the weight of the testimony, perhaps their verdict and the judgment thereon rendered ought not to be disturbed, were it not for certain bills of exceptions found on the record, by which it appears that evidence offered on the part of the appellant to rebut any presumptions arising from the proof of these circumstances, was rejected.

The testimony offered and rejected appears to have been intended to show that the defendant, previously and about the period at which she is alleged to have promised to pay for the purchase, had refused absolutely to become surety for him on other occasions, and to other persons. If the plaintiffs had offered testimony to prove the converse of this proposition, *i. e.* that she had been in the constant habit of becoming surety for the individual who bought goods from them, in his contracts with other persons, no doubt could be entertained of the admissibility of evidence to this effect as showing circumstances corroborative of the testimony of the single witness.

Proof arising from circumstantial evidence is essentially presumptive, and may properly be rebutted by the evidence of contradictory circumstances tending to oppose its truth.

We are of opinion that the judge *a quo* erred in refusing to admit testimony to show that the appellant had refused on several occasions to become security for the engagements of

the purchaser of the goods in the present instance to other persons, or that she was in the habit of refusing to bind herself for him.

BANKS

vs.

DOW.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled; and it is further ordered that this cause be remanded to said court to be tried *de novo*, with instructions to the judge to admit the testimony as offered by the appellant, or similar testimony, if offered; the plaintiffs and appellees to pay the cost of this appeal.

BANKS vs. DOW.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If the law and the facts of a case are free from doubt, damages will be allowed for a frivolous appeal.

Preston, for appellant.

Rost, contra.

1. The defendant admits his signature. The signature of the endorser, and the date of the transfer, are proved by the witness.

2. The account of the defendant is not proved, and if it was, cannot be allowed, against the plaintiff.

3. The appeal was taken for delay, and the judgment of the District Court ought to be affirmed with ten per cent. damages and costs.

EASTERN DISTRICT
March, 1893.

The facts of the case are stated in the opinion of the court, delivered by **PORTER, J.**

BRABO
vs.
MARTIN.

This is an action on a promissory note, executed by the defendant, in favor of one John C. Dunliere.

The petition avers that the payee endorsed and transferred this obligation to the plaintiff.

The answer admits the execution of the note, but denies that Dunliere ever endorsed it. It further avers that the endorsement, if ever made, was subsequent to the time at which the obligation was due, and that it is subject in the hands of the petitioner to all the equity it would be open to, if suit was brought by the payee.

It is proved that the payee did endorse the note previous to the time it fell due.

The district judge gave judgment against the defendant for the amount claimed in the petition, and he appealed.

If the law and the facts of a case are free from doubt, damages will be allowed for a frivolous appeal.

The instrument sued on appears to be negotiable; we are unable to see on what ground the defendant appealed. The law and the facts of the case appear to us free from doubt, and we are compelled to accede to the prayer of the appellee, that the judgment below should be affirmed with damages.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, and ten per centum damages for the frivolous appeal.

EASTERN DISTRICT
March, 1832.

RIBAS ET AL vs BENNETT.

RIBAS ET AL

vs
BENNETT.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The plea of prescription will not be sustained, if the party pleading it do not show that his civil possession has been exclusive.

Of two claims to a tract of land under concessions when Louisiana formed a Spanish province, that will prevail, which has been regularly entered before the commissioners, and confirmed by the act of congress of 1820.

The plaintiffs in this action, Mariano Ribas and Roman Colmenero, allege that Jacques Rigand in 1781, obtained from the Spanish government a concession of forty arpents in the Grand island or Barataria, which were located from the eastern extremity of the island. They allege that Cailler, in 1783, obtained a similar concession of forty arpents on the island, which were located at a distance of more than thirty arpents from Rigand's land; and that Anfray, alias Normand, in 1785, obtained a concession of all the vacant land between the tracts conceded to Rigand and Cailler, and in 1787, Dupene obtained a concession for the remainder of the land behind Cailler's concession.

In 1801, as is alleged in the petition, Cailler's vendee, in a dispute about boundaries, admitted Anfray's title to thirty arpents, measuring from Rigand's boundary, and accordingly in the presence of parties, lines were drawn and ditches dug to serve as boundaries. In 1809, Anfray caused his land to be surveyed conformably to these bounds, and his title thereto was confirmed by the United States. The plaintiffs aver that Dupene's widow in 1809, by an *ex parte* survey caused stakes to be placed on ten arpents of Anfray's land.

The plaintiffs are the present owners of the land conceded to Anfray, and twenty-three arpents of that conceded to Rigand; and pray that the metes and bounds placed on their land may be removed, and that possession may be restored with damages, &c.

EASTERN DIST.
March, 1833.

HERAS ET AL.
vs.
BENNETT.

The defendant, who is the owner of the land conceded to Cailler, denied the principal allegations of the petition, refusing to charge him with damages, averred the validity of his title, and impleaded in the suit as a party in interest the present owner of the tract of land conceded to Dufresne. He appeared, denied the principal allegations of the plaintiff, and alleged that his title was valid to the land of Dupont's concession.

On these pleadings the parties went to trial, and judgment was rendered for the plaintiffs, from which, after an unsuccessful attempt to obtain a new trial, the defendant, Bennett, appealed.

L. C. Duncan, for appellants.

1. The order of survey, grant and titles, under which defendant holds, taken in connection with the evidence, support his claims, and show that the judgment of the District Court is erroneous.

Morphy, for appellees.

1. The order of survey under which plaintiffs claim, having been recorded and confirmed, must prevail over defendant's title, which is incomplete and not recorded. *Ingersoll's Digest*, p. 508, 529.

2. The agreement of 1801, is binding on the assigns of Encalada, C. C. arts. 2239, 3522, sec. 5. *Toullier*, v. 8, art. 245, p. 373.

MATHEWS, J. delivered the opinion of the court.

This is an action of *bornage*. The plaintiffs in their petition, set forth the different grants or concessions of the neighboring proprietors in the island of Barataria, or Grand Isle, where the property in dispute is situated.

These concessions were made by authority of the Spanish government, and appear not to have prevailed farther than

orders of survey under that government, which were not executed until since Louisiana was acquired by the United States. The disputed limit in the present instance is that which divides, or is the common boundary between the grant made to one Anfray, alias Norman, and that made to a person named Cailler. The plaintiffs claim title as derived from the former, and the defendant derives his title from the latter through or under one Manuel Encalada. He alleges possession in himself and others, under whom he claims, according to limits established by a deputy surveyor of the United States in November, 1809, and pleads prescription. The land between the disputed limits is of a triangular form and the right to possess it as claimed by the plaintiffs, depends on the quantity of front which Anfray was entitled to have (according to his concession) on the gulf of Mexico. The court below rendered judgment in favor of the plaintiffs, from which the defendant appealed.

The pleadings and evidence of the case show that four orders of survey were obtained from the Spanish authorities, for land in the Grand Island or Barataria, to an amount sufficient to cover nearly the whole island. One in favor of Jacques Rigand in 1781, or 1782, of forty arpents front at the eastern end of the island; another for forty arpents in favor of one Cailler in 1783, to be located at some distance from the tract of Rigand; Cailler's tract being that now owned by the defendant. A third order of survey was granted in 1785, to François Anfray, alias Norman, for all the vacant land which might be found between the tracts granted to Rigand, and to Cailler; and a fourth order issued in 1787, to one Dufrene, for forty arpents at or towards the western end of the island. These different portions of land were settled on and occupied by the persons who had obtained permissions to settle and orders of survey, or persons claiming under them previous to the time when Louisiana was ceded to the United States. But previous to that time no actual surveys had been made or limits fixed between the occupants. After the change of government and sovereignty of the province of Louisiana, (from any thing appearing in evidence

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in the present case.) Anfray was the only claimant who filed his claim before the land commissioners of the United States, and in pursuance of it, caused a survey to be made in May, 1809, by William Henry, a deputy surveyor. This survey gives the limit contended for by the plaintiffs, and thirty arpents in front on the gulf.

In November of the same year, Truard, a deputy surveyor of the United States, under Lafon, surveyed all the tracts of land for the different claimants on the island beginning at the western end, and fixed the limit below Cailler's concession and that of Anfray, as contended for by the defendant. Anfray refused to attend at the operations of his last surveyor, or to exhibit his title, relying, it may be presumed, on the survey previously made by Henry in conformity with his claim. Now had there been no survey except the general one made by Truard, and all the claimants and persons holding under them, had possessed and acquiesced in it until the commencement of the present action, it is probable that the plea of prescription would have been available to the defendant. But in consequence of the survey made by Henry, and the occupancy of Anfray, and those holding under him in pursuance of that survey, the question presented for decision is one merely of *bornage*, and not affected by prescription; for the defendant, and those who possessed before him, cannot be bound as having had exclusive civil possession of the premises in dispute. See 6 N. S. p. 703, the case of *Bourguignon vs. Boudousquie*.

The plea of prescription will not be sustained, if the party pleading it do not show that his civil possession has been exclusive.

Of two claims to a tract of land under concessions when Louisiana formed a Spanish province, that will prevail, which has been regularly entered before the commissioners, and confirmed by the act of congress of 1830.

The evidence of the cause shows, that as far back as 1801, a dispute about limits arose between Anfray and Manuel Encalada, who then held the land conceded to Cailler, which was amicably adjusted by allowing the former thirty arpents front on the gulf of Mexico. The survey by Henry seems to have been made in accordance with that settlement of limits; and when we take into view that Anfray appears to be the only claimant of lands on the Grand Isle or Barataria, who regularly entered his claim before the commissioners, which was surveyed in 1809, giving limits, such as are now conten-

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ded for by the plaintiffs, and that this claim was confirmed by an act of congress, passed in 1820, we are unable to perceive any error in the judgment of the court below.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The facts must be stated on which professional men base their opinions given in evidence in a cause.

The opinion of one witness is inadmissible to prove another's professional skill or reputation.

Schmidt, for appellant.

1. The judge erred in refusing a new trial, the verdict being clearly contrary to law and evidence. *Civil Code*, arts. 2496, 2502, 2508. *Beck's Med. Jurisp.*, vol. 1, ps. 350, 361, 375. *Broussais sur la Folie* ps. 233, 231, &c.

2. The judge erred in excluding evidence in relation to the capacity of the medical witness, to form a correct opinion.

3. It being conclusively proved, that defendant concealed facts within his knowledge, which good faith and the interests of the plaintiff required him to disclose, he must bear the loss and refund the plaintiff the purchase money. *Vide Civil Code*, art. 2449. *Pothier Cont. de Vente*, ps. 233, 295, &c.

Soulé, for appellee.

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The facts are stated in the opinion of the court, delivered
by PORTER, J.

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This is an action brought to recover the price of a slave, alleged to be afflicted with redhibitory defects. The cause was submitted to two juries in the court of the first instance. The first could not agree, and the second found a verdict for the defendant. The plaintiff made an unsuccessful attempt to obtain a new trial, and appealed.

On the trial the plaintiff called a physician who had seen the slave just after she had recovered from a fit, and he pronounced that she had been affected with epilepsy. He gave testimony to this effect. The correctness of this opinion, and the capacity of judging correctly of the nature of the disease, when the patient was not seen by the physician during the fit, appear to have been strongly contested by the parties. Another medical gentleman was called, who deposed, that a physician who had only seen a subject twice, and not at the moment of convulsions, could not state *a priori* with certainty, whether she was mad or epileptic. Whereupon the counsel for the plaintiff asked the witness, what was the medical reputation of the doctor who had testified to the fact in controversy, and what in opinion of witness was his capacity to form a correct judgment on such a matter? This question was objected to and overruled.

The general rule of evidence is, that facts are to be proved to a jury. An exception is made on questions of science, in matters purely professional, and particular branches of trade or manufacture. Opinions of persons skilled in these respective matters are received; and those of physicians fall within one of the classes just stated. Their opinions are evidence, but they must state the facts on which these opinions are based, and in case witnesses of this description differ in opinion, the jury must judge at last which of them is entitled to most weight. In this instance an attempt is made to carry the exception one step further, and inquire as to the opinion of the witness in regard to the capacity of another to form a correct judgment, and his opinion as to that wit-

The facts must be stated on which professional men base their opinions given in evidence in a cause.

The opinion of one witness is inadmissible to prove another's professional skill or reputation.

ness' reputation for professional skill. This we think cannot be done. It would lead to any thing but a satisfactory result. Another witness might then be called to give his opinion as to the capacity of him just examined, to form a correct opinion on the degree of weight which was due to the testimony of the first, and so on. The jury are to judge of the weight due to the opinion of medical men on the disease, from the facts detailed by them, and the reasons given in support of their conclusions, not from the opinion others may form of their capacity. The judge, therefore, in our opinion, did not err in rejecting the testimony offered. 8 Mass. 371. 9 *ibid.* 225.

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On the merits, the evidence if it preponderates at all on behalf of the plaintiff, does not do so to an extent which would authorise the court to interfere with the verdict of the jury, and it is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

THOMSON vs. BROTHERS.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

If a plaintiff introduce evidence to prove a particular fact, he cannot afterwards object to the introduction of evidence by the defendant, to disprove it.

If a question arise as to the kind of a roof required by the contract for constructing a house, and on which the contract is silent, evidence *aliunde* to explain it, is admissible.

McMillen, for appellant.

1. The judge erred in refusing to hear testimony on the disparity of price in raising the walls, and that necessary to widen the foundation.

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2. Also in refusing to hear testimony of an architect, as to the price paid for erecting the houses described in plaintiff's contract, in order to preclude the supposition, that the shed-roof was contemplated in said contract.

3. There is error in the judgment, in not allowing defendant's claim filed, amounting to the sum of one hundred and thirty dollars.

4. Defendant was not liable for rent, for not delivering the houses sooner, as he was not paid for building the same, by plaintiff's own showing, until long after they were delivered; therefore, he was never in delay, and there is no proof of his having been in delay in finishing them. Ten dollars per month should have been deducted from rent of premises, which defendant occupied, on account of the destruction of a work shop.

Roselius, contra.

1. The decision of this cause, depends merely upon questions of fact, on which the verdict of the jury is entitled to great weight.

2. The defendant had no right to charge for extra work, because he has not shown that any work not included in the contract, was performed by him, in compliance with the wish of the defendant. In fact, no extra work is proved to have been done. *C. C. art. 2734.*

The facts are stated in the opinion of the Court delivered by MARTIN, J.

The defendant and appellant complains, that the first judge erred in refusing him leave to prove, that there was a great difference in the expense and labor in raising the walls of the plaintiff's houses, beyond the original height, and which would have attended the widening the foundation to the width stated in the contract. The proof was intended to counteract the assertion of one of the plaintiff's witnesses, that the increased height of the wall, was a proper offset to the diminution in

width of the foundation. The defendant further contends, that the judge erred in refusing to allow him to establish by the testimony of an architect, that the price paid for certain buildings, described in the contract annexed to the petition, was so low, that it precluded the idea; that the making shed-roofs, which were alleged to be an extra work, and for which compensation was claimed, was contemplated by the parties.

On the first point, the testimony was objected to, on the ground that the defendant, who claimed an allowance for the raising of the walls, as an extra work, had not shown that it was done at the plaintiff's request. We are of opinion, that as the plaintiff had introduced evidence on this part of the case, he could not object to the defendant's attempt to diminish or destroy it, and the judge erred in denying leave to the defendant to do the like.

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If a plaintiff introduce evidence to prove a particular fact, he cannot afterwards object to the introduction of evidence by the defendant, to disprove it.

On the second point, the introduction of the testimony was refused, on the ground that it was impertinent to the issue, as the contract spoke for itself. The defendant claimed payment for the shed roofs, as an extra work; the plaintiff contended they were included in the work the defendant had undertaken to do for a certain sum. It is contended by the plaintiff's counsel, that this was an attempt to introduce testimonial proof *beyond* what is contained in the act, which the *Civil Code*, 2256, prohibits. This, in our opinion, was merely an attempt to cause a *latent* ambiguity to disappear. Whether the house was to have shed roofs or not, is a matter on which the contract was absolutely silent, evidence was therefore to be sought *aliunde*. If a house let or leased on a given rent,

without stating whether it be a monthly or yearly one, parol evidence is certainly admissible, to establish that the rate of the rent manifests, that the parties contemplated a yearly one.

If a question arise as to the kind of a roof required by the contract for constructing a house, and on which the contract is silent, evidence *aliunde* to explain it, is admissible.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the Parish Court be annulled, avoided, and reversed, the verdict set aside, and the case remanded, with directions to the judge, not to refuse leave to the defendant, to introduce the evidence, of the rejection of which, he complains: the plaintiff and appellee paying costs in this court.

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CAMP.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

In the *Code of Practice*, articles 212 and 214, the words "leave the state" and "remove from the state," are synonymous, and an affidavit made in accordance with either, is sufficient.

Benjamin, for appellant.

I. The affidavit for arrest is good and sufficient in law, because it is drawn up in the terms directed by law, or in other terms, equivalent thereto. *Code of Practice*, arts. 212 and 214.

Hoffman and Hill, contra.

The facts are stated in the opinion of the court, delivered by MATHEWS, J.

This case is brought before the court on an assignment of errors apparent on the face of the record, in relation to the construction given by the court below, on the art. 214 of the *Code of Practice*, relative to bail, &c.

In the commencement of this suit no affidavit was made, in order to have the defendant arrested, &c. Afterwards a supplemental petition was filed, in which the plaintiff stated that he had reason to believe the defendant was about to remove from the state, without leaving in it sufficient property to satisfy the demand of the former. To this supplemental petition an affidavit was annexed, in which the plaintiff declared that the defendant was about to leave the state, &c. In pursuance of this affidavit, an order for bail was granted, on which the defendant was arrested and gave bail. The order for bail was afterwards rescinded on account of the insufficiency of the affidavit, as thought by the judge *a quo*.

The affidavit and order for bail, are grounded on the arts. 212 and 214, of the *Code of Practice*. The first of these

article authorises bail to be required, when a debtor is about to leave the state, even for a limited time, &c. The second requires the creditor to swear that he verily believes that the defendant is about to remove from the state. Now it is clearly seen from the article 212, that bail may be required, when a debtor under certain circumstances is about to leave or remove from the state temporarily. And the article 214, only requires that this fact should be established by the oath of the creditor. Although the words *leave* a state, and *remove* from a state, may not on all occasions be considered as synonymous; yet it seems to us, that in these two articles of the Code, they are used as complete synonyms, and that the same idea would be conveyed by either one or the other when used in an affidavit, to hold to bail, under the provisions of the Code.

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In the Code of Practice, articles 212 and 214, the words "leave a state" and "remove from a state," are synonymous, and an affidavit made in accordance with either, is sufficient.

We are therefore of opinion, that the judge *a quo*, erred in setting aside the order for bail, and dismissing the supplemental petition, consequently.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, in this respect, be reversed and annulled, and that the order for bail be reinstated, the bail bond rendered valid, and that the cause be remanded to be further proceeded in the court below, according to law, the appellee to pay the costs of this appeal.

VERSAILLES, F. W. C. VS. HALL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The contract of apprenticeship is not susceptible of alienation, but is personal, and ceases at the death or insolvency of the master.

The facts are stated in the opinion of the court delivered by PORTER, J.

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This case presents distinct questions in relation to the two minors.

Pierre Avariste, who was originally bound to Hall & Adams, agreed with the consent of his mother, and the approbation of the mayor, that the indenture should be transferred to the defendant. As the original indenture thus transferred, was made previous to the promulgation of the *Louisiana Code*, the case falls within the law as settled in *10 Martin*, 358, and the right to annul the indenture must be denied. The question whether the master, under the provisions of the *Louisiana Code* can correct the indented servant with a whip, need not be decided in this case.

John Baptiste's indentures, however, have not been transferred with the approbation of the mayor, and the defendant's right to his services depends on the validity of the transfer made to him by his partner, Adams. The contract of indenture appears to us to be personal, and not susceptible of alienation. The character, temper, &c. of the master, enter much into the considerations on which such an agreement is made, and he has not a right to substitute another in his place, without the consent of the minor, or his legal representatives. Chancellor Kent says, it is yet not definitely settled, whether an indented apprentice can be assigned from one master to another; though he cites cases which go far to show that it is considered he cannot. Lord Mansfield said, in the case of the *King vs. Stockland*, that though an apprentice is not assignable, yet if he continue to serve the new master he might gain a settlement under the poor laws. In the case of *Baxter vs. Benfield*, it was decided, that a contract of apprenticeship ceased with the life of the master, and did not pass to his executor. We apprehend it would be the same thing in case of insolvency. The interest in the services of the individual indented would not pass to the syndics. Nothing positive can be found in our laws on the subject. It would seem difficult to assimilate free children to property which passes by a transfer in writing, or by delivery; or that they have no higher protection against

The contract of apprenticeship is not susceptible of alienation, but is personal and ceases at the death or insolvency of the master..

a transfer to a bad master, than a slave. 2 *Kent's Commentaries*, ed. 1832, 265. *Douglass*, 70. 2 *Strange*, 1266.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court, so far as it relates to the apprentice, John Baptiste, be affirmed, and that the judgment of said court in relation to Pierre Evariste, be reversed, and that as to him, there be judgment in favor of the defendant, the costs to be paid in equal proportions by the plaintiff and defendant.

Levy and Buchanan, for appellant.

Chapotin, for appellee.

ROCHELLE'S HEIRS vs. COX.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The return of a process made before judgment, cannot be amended after it.

It is no objection to an amended return, that it contradicts the original one.

If a petition states the defendants are bound *in solido*, and prays judgment, without saying against whom or in what manner, judgment is given according to the obligation as stated.

The defendant and nine others, were the sureties of William Gibbes, late Paymaster of the First Regiment of Infantry, in the army of the United States, on a bond in the penalty of ten thousand dollars. In the words of the bond, they "are held and stand firmly bound and obliged unto the United States of America," &c.

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Another bond with the same penalty, was also given by Gibbes and others to the United States, but to which the defendant was not a party.

On the 21st January, 1819, judgment was rendered in the District Court of the United States for the Eastern District of Louisiana, on the bond, which the defendant, among others, had signed; and on the 5th October, 1826, a writ of *fiery facias* was issued, upon which, the marshal of the court made the following return:—

“Received, 5th October, 1826. Served upon W. H. Montgomery same day, as one of the executors of the late R. L. Rochelle, one of the securities. Stayed by agreement of the Attorney General, J. W. Smith. Returned 11th December, 1826.”

On the 2d of June, 1827, the following entry was entered on the record and attested by the clerk. “In this case, it appearing that subsequent to the date of the judgment, the balance due the United States from the said Gibbes, late Paymaster in the army of the United States, has been reduced; it further appearing that no citation had been served in the suit of the United States vs. William Gibbes, as Paymaster in the army; and that a certain agreement was on day last, entered into by the executors of R. L. Rochelle, with the District Attorney, as one of the securities, (of which a copy is herewith filed,) respecting the payment of said debt; ordered, that the said two judgments be amended, so as to call for fourteen thousand four hundred and eighty dollars and twenty-three cents, with interest at the rate of six per cent. from the date of said agreement.”

Judgment having been rendered in the court below for the plaintiffs, the defendant appealed.

Strawbridge, for appellant.

1. The attempt to amend the judgment is a nullity.

2. So is the attempt to amend the Marshal's return.

First. Because it was too late. 10 *M. Rep.* 91.

Second. Because it was to contradict the former return.

3. That return stated the writ had been "stayed by agreement with the District Attorney." Had the money been made under that writ, it must have been stated. To declare that a writ had been stayed by plaintiff's agreement, and to declare that the officer had made the money, are different things. If the Attorney General stayed the writ, the Marshal had no authority to act under it. If he received the money, he received it without authority.

4. The levy is not a satisfaction of the debt. *8th Johns. Rep. 249.* The case now before the court, then rests upon the same ground as that formerly decided.

5. If the judgment was only several, Rochelle was not bound with or for Cox, for his share, and there is no legal subrogation, and a conventional one is not shown.

Carleton, Locket, and Kelly, for appellees.

MARTIN, J. delivered the opinion of the court.

The plaintiffs state, that their ancestor, the defendant, and eight other persons, were sureties of Gibbs, a regimental Paymaster of the United States, on a bond, the penalty of which, was ten thousand dollars, on which the United States obtained judgment against the principal and his sureties; and on the same day, they also obtained another judgment of the same amount, on another bond, against the same principal, the plaintiffs ancestor and others, his sureties, but not against the defendant, who was not a party to the second bond. That it being ascertained that the sum due by Gibbs was less than the aggregate amount of both judgments, it was reduced to fourteen thousand four hundred and eighty dollars and twenty three cents, with interest at six per cent. from the 26th of October, 1826, on which day, the executors of the plaintiff's ancestor, paid to the Marshal of the United States, who had in his hands writs of execution issued on said judgments, thirteen thousand one hundred and thirty-seven dollars and fifty-seven cents, out of the moneys of the estate; and on the 7th of April, 1827, they paid into court, out of the same moneys, one thousand seven hundred and twenty-five dollars,

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in satisfaction of said judgments; in all, fourteen thousand eight hundred and sixty-two dollars and fifty cents, which sum was afterwards paid to the proper officer of the treasury of the United States; one half of which went to the discharge of the judgments obtained on the part of Gibbes' bond, being the one in which the defendant was bound as a surety.

The plaintiffs averred that they were by this payment subrogated to the rights of the United States Court, and consequent judgment against the defendant, for his proportion thereof. That the principal and all the sureties on the bonds, except the plaintiff's ancestor, the defendant, and two others, viz: Henderson and Ramsey, are insolvent.

On these facts, the plaintiffs claimed judgment for one-fourth of the sum paid in discharge of the judgment against their ancestor, the defendant, their co-sureties and principal, with interest from the day of payment till that of satisfaction.

The general issue was pleaded.

The District Court was of opinion that *six* of the sureties were still solvent, and gave judgment accordingly.

The defendant appealed.

His counsel has not contested any of the facts proven below, except the insolvency of some of the sureties; but he has argued the nullity of the amendment of the judgment and that of the amendment of the return of the Marshal of the United States, to the execution.

What the counsel is pleased to call the amendment of the judgments obtained by the United States, is nothing but the entry by which the United States admitted that the judgments were reduced to the real balance due by Gibbes, which a partial settlement of accounts ascertained. This is the constant practice, where a plaintiff, in Courts of the United States, discovers he has taken judgment for more than is really due to him, a measure demanded by a strict moral sense, and often necessary to avoid being mulcted in costs of a suit in a Court of Equity, if the defendant be driven to his resort there for an injunction. • Neither are we able to see what benefit could result to the defendant, if the objection was sustained; for this could not diminish the plaintiff's claim on him.

As to the amendment of the Marshal, the counsel has contended that it was made too late, and he has referred us to 10 *Martin*, 91, the case of *Hatton vs. Stillman, and al.*, in which we held that the Sheriff's return could not be amended, after the termination of the suit.

The return of a process being the basis, the foundation on which the judgment rests, it is clear that it must be amended, if amended at all, before judgment, for after it, the foundation of it cannot be subtracted; it is otherwise as to returns, posterior to the judgment, like that in an execution. To such a return, the rule in 10 *Martin* cannot be said to be applicable.

It has next been contended that the amendment in the second return, contradicted the first. The one stated the writ to have been stopped by the direction of the District Attorney, the other that the money was made. It appears to us every amended return must contradict the former absolutely or partially, *i. e.* by adding to or detracting from it; and if a return can be amended, it cannot be a good objection to the amendment, that it contradicts the original return.

Lastly, the defendant's counsel has asserted, that the judgment was several *only*; that the plaintiff's ancestor was not bound with or for the defendant's, therefore there was no legal subrogation, and a conventional one is not pretended.

In the case of the *United States vs. Hawkins' heirs*, 4 *Martin*, N. S. 313, we held that a judgment against several persons, which does not exist, they are condemned *in solido*, binds them for their virile part only. That the judgment may be presumed to follow the obligation it enforces, the presumption ceases, where the claim does not follow the obligation. We think the converse of this proposition is correct, *i. e.* that where the obligation is stated to be *in solido*, and the petitioner claims judgment on it, the judgment must be presumed to be *in solido*. In the present case, the petition states the parties to be bound in *solido*, and prays judgment, without saying against whom, nor in what manner. The conclusion, therefore, is, that judgment is given according to the obligation as stated in the pleading.

The record shows that six of the sureties only are solvent.

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The return of a process made before judgment, cannot be amended after it.

It is no objection to an amended return, that it contradicts the original one.

If a petition states the defendants are bound *in solido*, and prays judgment, without saying against whom or in what manner, the judgment is given according to the obligation as stated.

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They are all to bear the shares of the four who are not so. *Old Civil Code*, 430 a 12. The first judge consequently correctly concluded, that the defendant was liable for one-sixth of the sum paid by the plaintiffs' ancestor in discharge of the judgment obtained on the bond.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

REEVES vs. ADAMS.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The rules which govern the manner of citation in a suspensive appeal, apply equally to one which is devolutive only.

The Supreme Court will consider the entire case, and decide on its merits, if either the clerk, or the judge *a quo*, certifies that the record contains all the documents and evidence on which the cause has been heard and determined.

If prescription be first pleaded in the Supreme Court, and the plea must be sustained on the pleadings and facts appearing on the record, the court will remand the cause, to afford an opportunity in the inferior court, to disprove the facts on which the plea is based.

Ives and *Nicholls*, for appellants.

1. The mortgage was paid and satisfied.
2. The claim of the heirs was prescribed, and mortgage extinct.
3. Plaintiff was never disturbed in his possession.
4. Plaintiff's right of action was barred by prescription, and may be taken advantage of in the Supreme Court. *Code*

of Practice, 902, La. Code, 3507, Old Civil Code. *Martin's Eastern Dis.*
Reports, 7 N. S. 110, 111. *Union Cot. Manufactory vs. Lobdell.*
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Burk and Davis, for appellee, relied on the following points and authorities.

1. The appellant is not competent to appeal, he having acquiesced in the judgment by voluntarily suffering it to be executed. *Code of Practice*, 567, no. 1.

2. The appeal has not been made returnable according to law. 3 *La. Reports* 440. *Code of Practice*, art. 583.

3. There is no certificate of the judge, statement of facts, or bill of exceptions. *Code of Practice*, 586.

4. All this must be done previous to appeal. *Code of Practice*, 602, 603.

5. The answer admits all the allegations in the petition not expressly denied, and so far makes the plaintiff's petition evidence in his favor.

6. Prescription has once been pleaded and cannot be maintained.

7. The existence of the obligation to discharge the mortgage being admitted, performance must be shown, and the party is not competent to plead prescription.

8. There is no proof that defendant has used diligence to raise the mortgage.

9. Lovel Gilbert was not competent to discharge the mortgage.

The facts are stated in the opinion of the court, delivered by *MATHEWS, J.*

This suit is brought to have the sale of a certain tract of land (as described in the petition) rescinded, and to recover back the price, with interest, which had been paid by the plaintiff to the defendant. The rescission of the contract is claimed, on account of the defendant not having raised and cancelled a mortgage, which existed on the land at the time of sale, and which he bound himself to do, or cause to be

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done. He pleaded performance and fulfilment of the obligations created by the stipulation, to raise the mortgage, and that at all events it could not prejudice the rights of the plaintiff, being unavailable to the mortgagees, in consequence of legal prescription against its effects.

The court below rendered a judgment on the 5th of May, 1832, by which it was decreed, that the sale should be rescinded and annulled, and that the defendant should refund to the plaintiff the price which had been paid for the land, and interest at the rate of five per cent. per annum, until paid, unless the defendant should within six months from the date of the judgment, raise the mortgage, &c. On the 22d of January, 1833, the defendant obtained an order of appeal which was made returnable to the Supreme Court, on the first Monday of March of the same year, and was brought up in pursuance of the order; and since the appeal the defendant pleaded prescription to the action, of ten years under the *Old Code*, and five under the *La. Code*.

The appellee moves to have the appeal dismissed, on the following grounds: First, because the appellant has lost his right to appeal, in consequence of having acquiesced in the judgment, by voluntarily suffering it to be executed. Second, the appeal has not been made returnable according to law. Third, there is no certificate of the judge, statement of facts, or bills of exceptions made, as required by law, &c.

In support of the first of the grounds, on which the motion to dismiss is founded, reliance is had on *art. 567, no. 1* of the *Code of Practice*, wherein it is stated, that "a party against whom a judgment has been rendered, cannot appeal," if such judgment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily. As to this point, it suffices to say, that it is not in any manner supported by the facts of the case as they appear on the record.

In relation to the term of the Appellate Court, to which the appeal was made returnable, we are of opinion that there is no error or procrastination on the part of the appellant, sufficient to authorise or require a dismissal of his appeal. He had a right to appeal at any time within one

year, from the time the judgment was rendered in the court below. *Code of Practice*, 593. The appeal was not taken in the present instance, in time to operate a suspension of execution on the judgment of the District Court, it is only devolutive in its effects. Yet it is believed that the same rules are applicable to the manner in which the appellee should have been cited, which govern in suspensive appeals. We have already seen, that the order granting this appeal was given on the 22d of January, 1833. It seems by the citation and return, that the appellee resides in the parish of La Fayette. Now to allow the delay authorised by law, it is evident that there was not sufficient time to cite him to the next term of the court of appeals, which was in February, and consequently the citation and return of the appeal, were correctly made to the first of the term immediately succeeding. Therefore, the decision to be found in 3 *La. Reports*, 440, and relied on by the appellee's counsel, is not applicable to the present case. See that decision, and *Code of Practice*, art. 583.

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The rules which govern the manner of citation in a suspensive appeal, apply equally to one which is devolutive only.

It is true, that in this case there is no certificate of the judge *a quo*, as required by the 586th article of the *Code of Practice*, neither is there a statement of facts, nor bill of exceptions; and unless these deficiencies are supplied by the certificate of the clerk, under the article 896, the appeal must be dismissed, in pursuance of the provisions of the article 895, wherein it is declared that, "the Supreme Court can only exercise its jurisdiction, in so far as it shall have knowledge of the matter argued or contested below.

There is in appearance a discrepancy between the article 586 of the *Code of Practice*, relied on by the counsel of the appellee, and the article 896, on which the appellant's counsel relies. By the former it is declared, that if the testimony produced in the cause, have been taken in writing, and if the records contain all the evidence produced in the suit, the judge shall certify, &c., that they contain all the evidence adduced by the parties, otherwise he must make a statement of facts, &c. The latter provides, that if the record brought up, be not duly certified by the clerk of the lower court, as

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containing all the testimony adduced, the Supreme Court can only judge of such cause on a statement of facts, &c.

To reconcile these articles of the *Code of Practice*, or to give effect to both, it may not be useless to give a concise history of the practice as regulated by law, before the adoption of the Code. According to the act of the legislature of 1813, the first law passed in relation to judicial proceedings under the state constitution and government, a statement of facts was required to be made out, either by agreement of the parties to a suit, or in the event of their disagreement by the judge. Subsequently a law was passed requiring the testimony to be taken down in writing by the clerk, to serve as a statement of facts when requested by either of the parties to a suit. There was also a law authorising the Appellate Court to examine and decide a cause on its merits, when the evidence was entirely documentary, on a certificate of the judge of the lower court to that effect, and that the record contained all the documents on which the case was decided in the first instance.

In pursuance of the law authorising the testimony to be taken down in writing, by the clerk of the inferior court, it was his duty to certify, that the record sent up to the Supreme Court, contained all the evidence on which the cause had been decided, whether that evidence were composed entirely of testimonial proof, or partly of that and partly of written documents, and perhaps his certificate would have been sufficient, under the old rules of practice, in cases where all the evidence consisted of written documents. It seems to us, that the certificate to be now given by the judge, as required by the article 586, of the *Code of Practice*, has reference merely to that which he was previously authorised to give, in cases where the whole evidence consisted of written documents. The expression is in the Code, "if the testimony have been taken in writing, and if the records contain all the evidence produced in the suit, the judge shall certify, &c." It must be noticed that the expression, *have been taken in writing*, may, and probably does, refer to testimony taken by interrogatories, under a commission from the court, and not

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such as may be taken down in writing by the clerk during the trial of a cause, and where the whole evidence consists of testimony taken on interrogatories and written documents, the certificate of the judge to this effect, would suffice. But in the present case, the evidence is composed partly of documents and partly of testimony taken down by the clerk in writing. And he certifies that the record contains a true and correct copy of all the documents on file, transcript of the proceedings, and all the evidence adduced in the case, &c. This, we are of opinion, is sufficient according to the article 896 of the *Code of Practice*, to authorise this court to examine and decide the case on its merits.

According to this exposition of the present rules of practice, where the record contains all the documents and evidence on which a cause has been heard and determined in the court below, a certificate to this effect, made either by the judge *a quo*, or the clerk of that court, will authorise the appellate tribunal to take into consideration the entire cause, and decide it on the merits.

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The Supreme Court will consider the entire case, and decide on its merits, if either the clerk, or the judge *a quo*, certifies that the record contains all the documents and evidence on which the cause has been heard and determined.

The next point to be investigated, relates to the plea of prescription, made for the first time in this court. The right to plead prescription at so late a stage of a suit, is tolerated by law. Five years having elapsed since the promulgation of the *Louisiana Code*, and previous to the institution of the present action, which was commenced and prosecuted to obtain the rescission of a contract made between the parties in 1821, the article 3507, is applicable to the present case, according to the decision of this court, rendered in the case, *The Union Cotton Manufactory vs. Lobdell*, 7 N. S. 110. The prescription established by this article of the Code, is five years for persons present in the state, and ten for those who are absent. In the present instance, both parties are domiciliated in the state. The contract of sale, sought to be rescinded, was entered into in February 1821. In May of the same year, Adams, the vendee, promised by an act, under private signature, to raise the mortgage in question. The present suit was not commenced until October 1831. More than six years after the promulgation of the New

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If prescription be first pleaded in the Supreme Court, and the plea must be sustained on the pleadings and facts appearing on the record, the court will remand the cause, to afford an opportunity in the inferior court, to disprove the facts on which the plea is based.

Code. Now had the prescription relied on in this court, been pleaded in the court below, and no evidence been adduced to show that it had been interrupted, or the right acquired under it released by the defendant, we are of opinion that judgment ought to have been rendered in his favor. Not having been there pleaded, the plaintiff had no opportunity to show any circumstances, which might have taken his case from the government of the article of the Code, here relied on. The answer, as has already been stated, amounts virtually to a plea of performance, which is not so inconsistent with a plea of prescription, that both may not be used in the same action.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and that the cause be remanded, together with the plea of prescription pleaded in this court. The case to be tried *de novo*. The appellee to pay costs of appeal.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where ninety-three days had elapsed from the issuing of a commission to Matamoras, under which no testimony had been obtained, and no diligence was shown to have been used in endeavoring to obtain it, the party was properly ruled to trial by the judge *a quo*.

The facts are stated in the opinion of the court pronounced by PORTER, J.

This action is brought to recover from the owner of a vessel the amount of supplies of different kinds furnished for her. The schooner was sequestered, but afterwards released on the defendant giving bond.

A question is presented on the record in relation to the legality of an affidavit offered by the defendant, in order to obtain a commission to take testimony in Matamoras, which we do not find it necessary to decide, for it appears that he afterwards did obtain a commission, and that ninety-three days elapsed between the period of granting the same, and the day of trial. It does not appear that any testimony was obtained on it, nor did he show that he had used any diligence to procure the evidence. The court, therefore, did not err in ruling him to trial.

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Where 93 days had elapsed from the issuing of a commission to Matamoras, under which no testimony had been obtained, and no diligence was shown to have been used in endeavoring to obtain it, the party was properly ruled to trial by the judge a quo.

On the merits, the case is fully proved; and it is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE PARISH COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

It is unnecessary for a party to swear to the facts stated in a supplemental petition praying a sequestration, if he has sworn to the same facts stated in his original petition.

A contract made in one state or country will be enforced in another unless injury is thereby directly or indirectly done to the inhabitants of the latter.

A bill of exceptions to the introduction in evidence of a deposition on the ground that it has not been legally taken, is too general to authorise the Supreme Court to examine the validity of the official seal to the deposition of the officer by whom it was taken.

Where maritime interest is reserved, both principal and interest must be risked to confer upon the obligation the character of a bottomry bond.

A foreign creditor who has a lien on property is entitled to an equal privilege with a domestic creditor.

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which has been entered into for the loan of money, and confers an express lien on a vessel, cannot by the maritime law, follow her into other countries to the prejudice of rights acquired there.

This action was brought in 1830, for the recovery of the sum of six thousand nine hundred and sixty dollars, due on an instrument alleged to be a bottomry bond, upon the steamboat *Walter Scott*, then in the port of New-Orleans.

The bond was made in 1829, at Cincinnati, and signed by James Tallant, W. D. Jones, Joseph Pierce and Thomas Carneal; the first as principal, and the others as his sureties. Its first clause is as follows: "Know all men by these presents, that I, James Tallant, of the city of Cincinnati, Ohio, owner of the good steamboat called the *Walter Scott*, now lying on the stocks at Cincinnati, (to be launched at my risk as soon as the water will permit,) and necessitated at this time to borrow and take up upon the adventure of said steamboat, the sum of six thousand dollars, for the profitable and advantageous sailing of said boat for the period of one year from the date hereof, which said sum of money the Ohio Insurance Company have, on my request, *lent unto me and supplied me with, at the rate of nine hundred and sixty dollars for the said six thousand dollars, for the said period of one year from the date hereof.*"

The bond also contained the following clauses: "I, the said James Tallant, do hereby bind particularly all my right, title and interest in and to the said steamboat, with the freight, tackle and apparel of the same, to pay unto the Ohio Insurance company, the sum of sixty-nine hundred and sixty dollars in one year from the date hereof." "The said boat shall at all times after the expiration of the said period of one year from the date hereof, be liable and chargeable for the payment of the said sixty-nine hundred and sixty dollars, according to the true intent and meaning of these presents; and that it shall be lawful for the said Ohio Insurance Company, by their properly authorised agent or agents, on failure to pay to the said Ohio Insurance Company, the said sum of

sixty-nine hundred and sixty dollars, within the said period of one year from the date hereof, forthwith to enter upon take possession of, and sell at auction, or otherwise, as the said Ohio Insurance Company may judge proper, the said steamboat, and from the avails of such sale, as far as they may go, to pay and satisfy the said debt, with all reasonable and proper costs and charges that may be incurred thereby."

In case the boat should be lost during the year, it was agreed, "that then and thenceforth, that *every act, matter and thing herein contained* on the part of the said principal and sureties, except the payment to the said Insurance Company, of the sum of nine hundred and sixty dollars, *shall be void.*"

The plaintiff averred, that this alleged mortgage was endorsed on the enrolment of the boat, and was known to all subsequent purchasers and claimants.

The defendant, Edmondson, pleaded his title to the boat by purchase at Louisville, at a public sale, ordered by a court of chancery. He also pleaded usury, and the incapacity of the plaintiffs to enter into such a contract.

The Parish Court decided that the bond created a lien on the boat; that Edmondson knew of its existence when he purchased; and, deducting the claims proved for provisions and services rendered, the court ordered that out of the balance of the proceeds of the boat, which had been sold, by consent of parties, during the pendency of the suit, the plaintiffs should be paid. Edmondson appealed.

Hennen, Peirce and Hawes, for appellant.

Preston and Hoffman, for appellees.

1. The bottomry bond gave a lien on the steam boat *Walter Scott*, in favor of the plaintiffs. 2 *Blackstone's Commentaries*, 457. *Marshall on Insurance*, p. 632.

2. The boat was sold subject to that lien, both by the laws of Kentucky, and in point of fact; because the sale did not arrest the lien.

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3. The statute of Kentucky is not applicable; it applies to property situated in a county and conveyances in the state; it would be absurd to apply it to a steamboat which may be in twenty counties in as many hours.

4. She had not been at Louisville sixty days.

5. Hypothecation of vessels not required to be recorded in the mortgage and parish judge's office; *Code, art. 3362*; or must be recorded in every parish.

6. It must be made and recorded according to the laws and usages of commerce. *Article 3272*. The usage is to record it in the custom house.

7. The case being one which the statutes of no state contemplate to provide for, must be governed by the agreement and conduct of all the parties. Our agreement gives a lien and interest on the steam boat. Our notice to Edmondson gives us all equity against him; he gave only fifteen hundred dollars for the vessel, which was, he perfectly understood, six thousand dollars less than he would have paid, but that she was subject to our lien.

PORTER, J. delivered the opinion of the court.

The parties really litigant before this court are the plaintiffs, and the defendant, Edmondson. The former claim a lien on an instrument of writing executed by Tallant, the original owner of the boat, in the State of Ohio. The latter sets up title to her under a sale made in the state of Kentucky, in virtue of a decree of one of the courts of chancery of that state.

It is unnecessary to set out the pleadings, for after any detailed statement of them, they would only exhibit what has been already stated, as the substantial issue between the parties.

Before, however, entering into the merits, one or two questions relating to the regularity of the proceedings, present themselves for decision, and must be disposed of.

The suit commenced by a service of the petition and citation on the defendant, Edmondson, and there was a prayer

for a provisional seizure. After service of the original petition, a supplemental one was filed, in which the plaintiffs stated, they were obliged to ask for a sequestration of the boat. It was granted on an affidavit of their agent, in which he declared, that the allegations contained in the petition heretofore filed were true.

It is objected, that the allegations in the supplemental petition on which the writ of sequestration issued, are not sworn to, and that consequently the writ improvidently issued. However correct such an objection might be, in case the prayer for a sequestration rested on the facts set out in a supplemental petition, the court is of opinion the objection is not well founded in that now before it. In the supplemental petition, the plaintiffs allege no new facts; they on the contrary refer to the original petition, and make it the basis of their demand for a sequestration. The affidavit, therefore, of the agent repeating the averment of the truth of the allegations on which the plaintiffs claimed a lien on the boat, was the only one which could have been properly made; if indeed any were necessary, after the oath previously taken by him, to the truth of the facts stated in the original petition.

But a more formidable objection has been raised against the regularity of the proceedings. The statutes and jurisprudence of Louisiana, it is contended, only confer the privilege of sequestration to enforce liens given by its laws; and that, in aid of which this remedy was extended here, was not one that had any force, or conferred any privilege in our state, though it might have that effect in the country where it was made.

By the comity of nations a practice has been adopted by which courts of justice examine into, and enforce contracts made in other states, and carry them into effect according to the laws of the place where the transaction took its rise. This practice has become so general in modern times, that it may be almost stated to be now a rule of international law, and it is subject only to the exception, that the contract to which aid is required should not, either in itself,

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It is unnecessary for a party to swear to the facts stated in a supplemental petition praying a sequestration, if he has sworn to the same facts stated in his original petition.

A contract made in one state or country will be enforced in another, unless injury is thereby directly or indirectly done to the inhabitants of the latter.

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or in the means used to give it effect, work an injury to the inhabitants of the country where it is attempted to be enforced.

The objection now taken raises a distinction in cases so circumstanced, between remedies before and after judgment; and we confess we are unable to see any solid grounds on which it can rest. If it be true, as we apprehend it is, that the court can and should enforce the personal obligation which a party, not a citizen of the state, may have entered into in another country, and that on the judgment so rendered, the foreign creditor could obtain the benefit of all writs of execution which an inhabitant of Louisiana might resort to against a domestic debtor, then we can see no good ground for refusing the auxiliary process in the first instance; whether it be an order to arrest the person of the debtor, and hold him to bail, or a writ to seize the property brought within the jurisdiction of a court, if it be the subject of contest. Both seem to rest on the same principles. And a familiar illustration of the common received opinion on this subject, may be given in the case of attachments, which are almost every day resorted to in aid of the foreign creditor against the foreign debtor; and yet there is nothing in our law more expressly giving that remedy to the stranger, than there is in the case of sequestration.

We, therefore, think the writ properly issued, and that the property seized under it, must abide the decision on the merits.

A bill of exceptions to the introduction in evidence of a deposition on the ground that it has not been legally taken, is too general to authorize the Supreme Court to examine the validity of the official seal to the deposition of the officer by whom it was taken.

There was a bill of exceptions taken to the introduction in evidence of depositions taken in the state of Ohio. The objection made here is, that the return to the commission is under the official seal of the mayor; and that the *Code of Practice* requires it to be under the private seal of the commissioner. It is unnecessary to say what weight this objection is entitled to in a case where the commission is directed, as in this instance, to a public officer by his title, and not to him personally; for no objection was made on the ground taken here in the court of the first instance. The reasons given in the bill of exceptions are, that the depositions had not been

legally taken. This is too general; it is the duty of the party to put his finger on the particular defect.

On the merits of the case, there is much more difficulty than in the points just disposed of. The plaintiffs, as we have already stated, claim a privilege on the boat in consequence of a contract entered into in the state of Ohio, with her then owner. By the instrument which evidences this contract, it appears, the plaintiffs lent him the sum of six thousand dollars, for the use of which for one year he was to pay nine hundred and sixty dollars. The boat was to be navigated on the waters of the Ohio and Mississippi rivers during that time; a lien or privilege was given on her for the payment of the debt and interest; and it was stipulated that in case she was lost during the period just mentioned, the sum of six thousand dollars should not be demanded or recoverable from the debtor, but that the interest might.

It has been a subject of debate at the bar, whether this was not a bottomry bond. It certainly has many of the features of one; but we are inclined to the opinion that it cannot be considered such. Whether a bottomry bond may not be made to secure a sum of money lent with legal interest, payable at all events, seems to be a question not yet perfectly settled. But where maritime interest is reserved, the weight of authority appears to greatly preponderate in favor of the position, that both principal and interest must be put at risk. See *Story's Abbott*, 125. 4 *Binney*, 244. *Park on Insurance*, 416.

The plaintiffs' right to recover must therefore be found, if it exists at all, elsewhere than in the maritime law. He contends, however, that although the instrument may not confer the privilege of a contract governed by its rules, still by the laws of the state of Ohio, where it was executed, it gave a mortgage or lien on the boat, and that this lien existed on and attached to her when she was sold in Kentucky. In support of this position we have been referred to testimony taken in Cincinnati, and it certainly covers the whole ground which the plaintiffs have taken in argument. Possessing no knowledge of these laws ourselves, and not having the means

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of acquiring a knowledge of them except through the means resorted to, in this instance the proof furnished to us must guide and control our opinions. The evidence of the principal witness, by whom these facts are established, has been closely observed on, and our attention has been drawn to an acknowledgment made by him that he expected a fee from the Insurance Company, for the trouble he had taken in investigating the case. We cannot say that this circumstance authorises us to refuse credit to this deposition. The evidence itself carries in it internal evidence of fairness and truth. It appears to come from an intelligent man, and we are bound to presume one learned in his profession. Members of the bar in all countries, are in the habit of receiving compensation for their opinions. The fact of their doing so is never considered as impairing the weight justly due to these opinions, and the respect to which they are entitled, obviously is much increased when they are given under the solemnity of an oath. A servant under a salary from one of the parties, or an agent who receives compensation in the very case at issue, is a good witness, if his compensation does not depend on the event of the suit. But what weighs with us more than all this, in according full faith and credit to the testimony of the witness, is, that his deposition was returned into court in November, 1830; that the cause was not tried until May, 1831; and that if the defendant knew, or had reason to believe, the witness had mistaken the law, or mistated it, there was ample time to procure rebutting testimony.

If the Steamboat then, had remained within the State of Ohio, the evidence satisfies us, the plaintiffs could have had a lien on her. But the main difficulty in the cause still remains. She was sold in the State of Kentucky, under a decree of one of the courts of that state, and purchased by the defendant at the sale. It is admitted on all hands, that this sale was legal and regularly made, and the question is not, what was the effect of the lien in the county where the contract was made, nor in that where it is sought to be enforced, but what effect it had in the state where the defendant acquired title to the property.

The statutes of the State of Kentucky, the decisions of her courts, and the testimony of witnesses, possessing a knowledge of her laws, have been introduced in evidence. Reliance was placed in argument, on the fact of an agent of the plaintiffs having attended the sale at which the defendant purchased, and on his having given notice of the lien which his principals claimed on the boat. A decision of the Supreme Court of that State, has declared that notice to the purchaser at sheriff's sale, is not sufficient to enable the creditor to afterwards enforce his lien on the property sold, unless it is also shown, the creditor, at whose suit the sale took place, had notice of its existence at the time the debt was contracted. Other testimony taken in the cause, shows this to be the settled jurisprudence of that state, and the rule thus established is decisive of this part of the case. *Helen vs. Logan's heirs, 4 Bibb, 78.*

According to the testimony, it is shown that the courts of Kentucky would consider the bond on which this suit is instituted, though made in Ohio, a lien on the boat, and that in the language of the witness, it would operate on all persons who had notice of its existence, whether by record or otherwise.

By an act of the General Assembly of the State of Kentucky, approved 11th February, 1830, it is declared that no deed of mortgage or deed of trust, hereafter made or executed for or upon any real or personal estate, shall be good or valid against a purchaser, for a valuable consideration, without notice thereof, or against any creditor, unless such deed shall within sixty days after the acknowledgment or proof by two subscribing witnesses according to the existing laws, be deposited for record in the office of the County Court Clerk of the County, where the estate therein conveyed, or the greater part thereof, lies.

The State of Kentucky, we presume, gives effect to liens existing on property brought there from another country, on the principle of amity which we have already noticed, and we must also presume, until the contrary be shown, that she admits them with the same limitation which other states do; namely, that they shall not work an injury to her own citi-

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zens. To ascertain whether they do or not, recurrence must be had to her laws and policy in relation to contracts made within her limits; for we take the true principle in such cases to be, that the foreign creditor who has a lien, should have no greater or no less privilege, than the domestic creditor. If, for example, the laws of Kentucky required no record to be made of liens given on personal property within the state, she would not require registry on the part of the stranger who came there to enforce a mortgage on property, on which he had a lien in another country; for if she did, she would neither carry the contract into effect, according to the law of the country where it was made, nor according to her own. If this be true, whatever time is given to the domestic creditor to record his lien, should be given to him who comes from another state with one, if his lien be recognized as valid when enregistered, and his prayer to enforce it be admitted, as we are told by the testimony it could be.

On this principle, the plaintiffs have contended, they had sixty days to record their mortgage after the property was carried into the state where it was sold. The statute, we have already seen, requires the lien to be recorded within sixty days after it is given in the county where the property is situated. One of the judges of the State of Kentucky, has been interrogated under a commission, whether, in his opinion, this delay of sixty days, applies to cases where the property is not yet within the limits of the state, and he has replied, that he is unable to answer the question.

The difficulty which this learned person found in the question, has been fully shared by us. After the best consideration in our power, we, however, think, that if it be true as it is testified to us, that the lien existing on this boat would affect creditors and purchasers in the State of Kentucky, if duly recorded, it would seem to follow that the creditor's obligation to record, could only commence at the period she came within the state. The words of the statute are, that the act giving the lien, "must be deposited for record in the office of the County Court Clerk of the County where the estate lies." A record, therefore, in any other county would

not suffice, nor would a registry where the property was not, but where it might thereafter be, comply with the requisitions of the statute.

If then, the record could not be made pursuant to the act of Assembly, until the property was brought within the state, we conclude that the creditor had the delay of sixty days to make it. In all other cases, it is sufficient to enregister within that delay, after the lien has attached on property. Here the mortgage did not attach until the boat was brought within the state.

This decision eminently promotes the equity and justice of the case. One witness swears, and he is uncontradicted, that the boat at the time of the sale was worth nine thousand dollars. She was first stricken off to a bidder, who had been advised the lien of the plaintiffs did not bind her for seven thousand dollars and some dollars. Finding afterwards, there was a great diversity of opinion among legal men on the effect the mortgage might have, he declined complying with his bid, and the boat being put up at auction again, she was purchased by defendant for one thousand five hundred dollars. Under such circumstances, no one, we think, can doubt the defendant obtained her at that price, under a belief she was subject to the lien, and if any one could doubt it, that doubt is removed by the fact, that she sold in this city since the institution of the present suit, for eight thousand four hundred dollars.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed; and it is further ordered and decreed, that the plaintiffs do recover from the defendant, the sum of six thousand nine hundred and sixty dollars, to be paid in preference, out of the proceeds of the sale of the steamboat Walter Scott, with costs in both courts.

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ET ALs.

EASTERN DIS.
March, 1833.

OHIO
INSURANCE CO.
VS.
EDMONDSON
ET ALS.

SAME CASE.

The preceding opinion was delivered at the last May term, and a motion for rehearing was made on the following grounds, by *Hennen* and *Peirce*, for appellants.

1. That no judgment can be rendered, to divest Edmondson of his property, because of a debt due by *Tallant*, until judgment be rendered against *Tallant*. He may have paid, the agreement being private and without witnesses, may have been as privately annulled; in this case, *Tallant*, the debtor, and only debtor, has not been made a party.

2. That no proof, other than a private deed not witnessed, has been adduced to show, that six thousand dollars have been actually paid by the plaintiff to *Tallant*, it is good against him, but not against Edmondson.

3. Because if the rule be, that the creditor has sixty days from the first coming of the property into the State of Kentucky, to prove the reality of the deed by witnesses or acknowledgment, and record said proof or acknowledgment in the clerk's office, this does not aid the plaintiff, for the steamboat *Walter Scott* was twice before at Louisville, in May and in June, 1829, when she came there from New-Orleans, and took in cargo.

Preston and Hoffman, contra.

1. The rule of this court, which requires the parties to file the points and authorities on which they intend to rely, provides, that "no rehearing shall be granted on any points which the parties may have omitted to furnish, in compliance with this rule." The defendants omitted to furnish any points in compliance with this rule. A rehearing, therefore, cannot be granted. As well might a party ask for a new trial, without showing due diligence on the first trial.

2. James *Tallant* was made a party by the petition, answer, proceedings, evidence, and judgment, below.

A rehearing having been granted, and the case argued by the same counsel as before, at the present term the final opinion of the Court was delivered by PORTER, J.

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A rehearing was granted in this case, principally on the ground that there was evidence in the record, that the steamboat Walter Scott, had been sixty days within the limits of the State of Kentucky, previous to her sale under the decree of the Court of Chancery in that State.

It has been conceded on the last argument, that such is the truth of the case, and we have now to examine what change it should produce in our former judgment.

From the opinion already delivered, it is seen that the decision of the cause turned on a fact (erroneously) assumed by the court, that the steamboat had not been within the limits of the State of Kentucky sixty days, and that the act of Assembly of that State, gave the creditor a delay of that time, to record his mortgage.

Unless the argument since addressed to us have changed our first view of the case, the fact, just stated, must be decisive of the rights of the parties; but as our decree must now be adverse to the plaintiffs' claims, it is proper to notice the positions assumed by them, and which, in their opinion, rendered it unnecessary to enregister their mortgage.

In the examination, it is important to inquire whether the lien now sought to be enforced, is one which derives its validity from the maritime law, or from the local laws of the state, in which the defendant, Edmondson, acquired title to it. On this point, we refer to our former opinion, for the reasons on which we came to the conclusion, that the obligation in favor of the plaintiffs, could not be considered a bottomry bond. As it is not of that character, we are unacquainted with any principle of that law, by which an express lien on the vessel, conferred by the owner in the form of a written contract, for the loan of money, which attaches thereafter to the object affected by the agreement, and which follows her into other countries, to the exclusion of a real right which may be acquired in, or to her, in those countries.

A written contract, which has not the character of a bottomry bond, but which has been entered into for the loan of money, and confers an express lien on a vessel, cannot by the maritime law, follow her into other countries, to the prejudice of rights acquired there.

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The facts show Edmondson acquired under a forced sale, regularly and legally made in the State of Kentucky, all the right and interest of the owners in and to the boat, and he, therefore, must be maintained in the possession and free enjoyment of the object to which he thus acquired title, unless the plaintiff can establish, that by the laws of Kentucky, the lien which they held on the boat, affected purchasers at Sheriffs' sales.

The affirmative of this proposition has been strongly maintained, but the argument has not been successful in producing the desired conviction on our minds. First: It was contended that by the evidence, such an instrument as that produced in evidence, would give a lien by the laws of Kentucky. The witness (Southgate) who so states, cannot be understood by us, to give a greater effect to this mortgage, than that which belong to liens expressly recognized by the statute law of that state, when made within its limits; for, he adds, after stating that it would have effect in Kentucky, that it would bind all persons who had notice of its existence by record or otherwise.

It was also strenuously urged, that the statute of that state, which required enregistry in order to affect third parties, would have no application to steamboats which were moving through different countries, situated on the banks of its navigable streams. That statute provides, that no deed of mortgage or deed of trust, on or for real or *personal* estate, shall be good or valid against a purchaser for a valuable consideration, without notice thereof, or against any creditor, unless such deed shall within sixty days, be recorded where the estate then conveyed, or the greater part lies. From the wording of this statute, it evidently contemplated liens granted in the state, on property within its limits. When under the testimony adduced, we give effect to a lien made in another state, on property such as this, not then within any county of Kentucky, the question is, whether we can dispense with the recording in a county in Kentucky, when a third party acquires a right in, or title to her. We are without any decision of the courts of that state on this subject, but

it appears to us impossible to safely conclude, that they would sustain such a position. If a mortgage was given on a boat already within the state, and belonging to some person in it, we cannot doubt, that under the statute, it would be necessary to enregister it, in order that it might have its effect against third parties. It is evidently the policy of their laws, to require notice. The admission of a mortgage from another state, cannot be understood by us, to place the foreign creditor in a better situation than the domestic one; for the doctrine of giving effect to liens and laws from another state, must be always understood as subject to the condition, that the admission of them does not work an injury to the citizen of the state. We should act on these principles, if the transaction had taken place in this state.

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We have not noticed the objection made, on the ground that Edmondson had notice of the lien; for, according to the jurisprudence of the State of Kentucky, notice is required to the creditor, as well as the purchaser. 4 *Bibb*, 78.

Several privileged creditors intervened in the court below. Their claims do not appear to be disputed by either party, and the judgment of the Parish Court in relation to them, must be affirmed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided, and reversed; and it is further ordered and decreed, that the interveners in this cause be paid by privilege, out of the proceeds of the sale of the boat, and that of these interveners, there be paid to George Benley and others, the sailors and crew of said boat, as per voucher marked A, three hundred and twenty-two dollars and thirty-six cents; to Nath. Emerson, one hundred and twenty-seven dollars and twenty-seven cents; to Russell Ball & Co., one hundred and thirty-three dollars and eighty-three cents; to J. & R. Wolf, fifty dollars and sixty-eight cents; to Danl. Johnston, judgment in his favor, in United States Court, amounting, interest and costs, seventy dollars and thirty-four cents; and to Russell Ball & Co., as by document marked F, three hundred and eighty-two

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dollars and twenty-four cents; and it is further ordered, that the balance of the proceeds of the sale, be paid to the defendant, Edmondson, the plaintiffs paying costs in both courts.

PEMBERTON vs. ZACHARIE ET ALS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

In an action on a note given for the purchase money of real property, the plaintiff's consent to give security against the claims of certain persons, in whom defendant avers the title rests, is not an admission that security can of right be demanded, or that the same judgment could not otherwise have been rendered.

After appeal taken, an exception which has been dismissed, cannot be tried again in the inferior court, except by consent of the parties.

The effect of an appeal does not depend on the final disposition which may be made of it, but on the fact that it is pending and undecided.

A person may stipulate in favor of a third party, and if the latter avail himself of the advantage in his favor, it cannot be revoked.

This case comes before the court on a second appeal. On the first it was remanded on the ground that the order of appeal had been prematurely granted, the dismissal of the exceptions, from which the appeal had been taken, working no irreparable injury to the defendants. *Vide ante*, 22. On the second day after the first order of appeal was granted, the court below rendered a judgment approving the security offered by the plaintiff, and from this, and a judgment previously rendered on the merits, the defendants appealed.

Seghers, for appellants.

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1. The judgment allows interest from the day the instalments became due, where interest was not to be allowed, except from the day the security was given by the plaintiff, and accepted by a final judgment of the court.

2. Interest cannot run from the day the instalments became due, but from the day the notes became respectively demandable, which is three days later, owing to the days of grace which the law allows.

3. The court below erred in rejecting and overruling the exceptions of the defendants to the security offered by the plaintiff.

4. It erred likewise in denying and refusing to the defendants the right of having the testimony of the witnesses taken down in writing by the clerk, on the trial of the cause, on the sufficiency of the said security.

5. The second judgment rendered by the court below, whereby the security is approved, was rendered at a time when its jurisdiction was suspended by an appeal, and is therefore null and void *ab initio*.

Slidell, for appellee.

1. The sale from Pemberton to Erwin, all the obligations of which are assumed by the widow Zacharie, was made under the *Old Code*, as was also the sale from Erwin to Zacharie. The respective obligations of the vendor and vendees, are to be governed by the law existing at the time of the sale, under that law the purchaser had no right to withhold payment from dread of eviction. *Fulton's heirs vs. Griswold*, 7 *Martin*, 223. *Brown vs. Rives*, 7 *N. S.* 235. *Donaldson vs. Mites*, 8 *N. S.* 181. The vendees having no right to withhold the payment of price, can of course not escape from the obligation of paying interest, as legal damages for the delay the gratuitous offer of the plaintiff, to give security against the pretended claims of the heirs of *Belly*, can in no way impair his legal rights.

2. The error of the court below, if it be one, in allowing interest from the day the instalments became due, without

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reference to the days of grace, is too unimportant to call for the revision of this court. The defendants moved for a new trial, on various specific grounds, and the judgment was awarded on several of them; they should have required this amendment, which would not have been opposed below. *De minimis non curat lex.*

3. The dismissal and overruling of the exceptions pleaded by the defendants to the sufficiency of the security, was not in the nature of a final judgment, and no appeal could be taken from it; this point has been clearly settled by the dismissal of the appeal.

The opinion of the court, in this case, was delivered by PORTER, J.

These cases were consolidated in the inferior court. The judgment on the merits required the plaintiff to give security, and the security offered being objected to, a judgment of the court approving it, was also rendered. This appeal is from both decrees.

The error alleged in the judgment on the merits is, that the defendants were condemned to pay interest from the time the notes became due, although during that time they were in danger of eviction. The contract under which this contest has arisen, was entered into while the provisions of the *Old Code* were in force. According to them, it was not the fact of an outstanding title, but the institution of a suit, which enabled the buyer to suspend payment. No evidence is offered that any such suit was commenced in the present instance. The error, therefore, alleged in the judgment below, appears to us quite unsupported by the law in force at the time the engagement was entered into.

But it is contended, that however this may be, the particular circumstances attending the rendition of the judgment below, and the terms of that judgment, show that interest ought not to have been given. The answer of the defendants sets out various objections to the payment of the obligations sued on. None of which, so far as we can discover,

justify the position taken, that the defendants were not in *mora*, for it is no where alleged that suit has been commenced against them. However, on the judgment being about to be entered up, or perhaps before, for the record does not furnish us with precise information on this point, the plaintiff consented to give security against the claims of the heirs of P. Belly; in whom it is alleged by the answer, the real title to the land is vested. It is now contended that this offer to give security, is a sufficient acknowledgment, that judgment could not have been obtained without it, and proves that the defendants were justified in withholding payment. But we think this is carrying the effect of the admission too far. It cannot be understood as admitting more than the defendants have alleged in their answers, and they do not state that any suit had been commenced on the outstanding title. It is true, as we said, when this case was last before us, that the defendants had a legal right to see the judgment complied with, whether rendered by consent, or on the contestation of the parties, but the right depends on quite different grounds from the position now assumed, viz: that the offer to furnish the security, is an admission, judgment could not have been obtained without such condition. The plaintiff feeling himself able to give the defendants satisfaction on this point, without inconvenience to himself, may have preferred doing so to contesting the matter. And at all events, the consent cannot be understood to extend beyond the averments in the answer. We think, therefore, there was no error in the court directing the defendants to pay interest on the proceedings had in relation to the sufficiency of the security offered. The case has already been before us, on an appeal taken from a decision of the District Court, refusing the defendants leave to take down the testimony offered by them, in support of objections taken to that security. That appeal was dismissed, this court being of opinion it was premature, and that the injury, if any, could be redressed after final judgment, if the parties thought proper to bring the case before this court.

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In an action on a note given for the purchase money of real property, the plaintiff's consent to give security against the claims of certain persons, in whom defendant avers the title rests, is not an admission that security can of right be demanded, or that the same judgment could not otherwise have been rendered.

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An appeal has now been taken from the judgment of the court below, sustaining the sufficiency of the security offered. So that we have to examine whether the defendants had a right to have the testimony taken down. On this point we expressed ourselves so fully, when the case was first examined by us, that we deem it unnecessary to go again into it. We think they had that right, and we have only to examine whether any thing which took place afterwards, has deprived them of the privilege of placing their case before this court, on the evidence on which it was decided below.

The various proceedings which have produced embarrassment in the progress of this case, have been already stated in our former opinion. There is nothing further disclosed by the record of the second appeal, save that on the 25th of June, the plaintiff took a rule on the defendants, to show cause why the order granting an appeal should not be rescinded, and if it were, why the defendants should not furnish additional security on the appeal bond.

This rule the court after hearing argument, discharged. Whereupon the plaintiff took another rule to the same effect, and offered further, that if it were granted, the evidence might be written down, to the refusal of the court to grant which, the bill of exceptions had been taken.

We do not learn from the record what disposition was made of the rule, except that it was continued to the 7th of July.

The order of the first of June, dismissed the defendants' exceptions to the security, and from that decision an appeal was taken. We consider it clear, that after the inferior court granted the appeal, its cognizance of the case in the issue joined on these exceptions terminated, until that appeal was disposed of. The case could not be pending on this point in the Supreme Court and the District Court at the same time. It is true, that after judgment of dismissal, and before the appeal was decided, the plaintiff offered to withdraw all objections to the evidence being taken down. The question is, whether the defendants were compelled to accept this offer and withdraw their appeal. We think not

The court we are satisfied could not without the consent of the opposite party, try exceptions which it had already dismissed, when the right to review that sentence of dismissal had been withdrawn from it by an appeal. The defendants have not lost any of their legal rights by the responsibility to give that consent.

It has been contended, that as this court has decided that the appeal was improperly granted, it could not have had the effect of suspending proceedings in the inferior court. But it is obvious, that the effect of an appeal does not depend on the ultimate disposition which may be made of it, but on the fact that it is pending and undecided.

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After appeal taken, exceptions which have been dismissed, cannot be tried again in the inferior court, except by consent of the parties.

The effect of an appeal does not depend on the final disposition which may be made of it, but on the fact that it is pending and undecided.

It is, therefore, ordered, adjudged and decreed, that the judgment on the merits rendered in this case, be confirmed with costs, and that the judgment approving the security be reversed, and the cause on this point remanded to the District Court, with directions to the judge not to refuse the defendants permission to take down in court the evidence which they may offer in support of their exception, and it is further ordered, that the appellees pay the costs of this appeal.

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The question as to the obligation of Theodore Zacharie having, by consent, been reserved, the opinion of the court thereon was, during the present term, delivered by PORTER, J.

The parties have consented to the examination of this case on a matter presented by the answer of the appellee to the petition of appeal, but not embraced by the points filed in the cause.

It relates to the obligation of one of the defendants, Theodore Zacharie. It is contended, that by the terms of the act of adjudication, or sale of the property, of the estate of his

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ancestor, at which he became the purchaser, he bound himself personally for the discharge of the debt now sued for, and that the judgment of the court below should have been against him *in solido* for the whole amount of the plaintiff's claim.

A reference to the contract relied on by the plaintiff, shows that the defendant, Theodore Zacharie, undertook to perform the obligations which his mother had assumed in virtue of her contract with Erwin; and one of these was to pay the price of the property purchased from the plaintiff.

But it is contended that this was matter *res inter alios acta*, and the plaintiff cannot claim the benefit of stipulation, more especially as the Spanish laws were repealed at the time when the contract took place. And it is assumed that it was solely under them that a third party can claim the benefit of a promise in his favor, when made to a third person.

But this assumption is, in our understanding of the law, entirely erroneous. By the provisions both of our old and new Code, a person may stipulate in favor of a third party; and if the latter avail himself of the advantage in his favor, it cannot be revoked. This subject was very fully examined in the case of *Duchamp et als. vs. Nicholson*. And it was there decided, that no matter how the question stood under the Roman and Spanish laws, there could be no doubt that by the provisions of our Code, the right just spoken of was confirmed. *Old Code*, 264, art. 20. *Louisiana Code*, 1884. 2 N. S. 676. The former judgment of this court, therefore, must be amended to meet this view of the case.

And it is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and proceeding to give such judgment here as ought to have been rendered in the court below, it is decreed and ordered, that the plaintiff do recover *in solido* of Lavinia Erwin, and the heirs of Joseph Erwin, of the heirs of widow Zacharie, the sum of twenty thousand and five dollars, with interest at the rate of five per centum per annum, from March 30, 1830, until paid; and on the other sum of ten thousand dollars, interest at the same rate, from March 30,

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1831, until paid, and costs of suit. And it is further ordered and decreed, that said judgment as aforesaid, against Lavinia Erwin, and the heirs of Erwin, be paid and satisfied by them as follows; that is to say, the said Lavinia Erwin shall pay the one half thereof, and Lodicia, wife of William B. Robertson, Isaac Erwin, Elvira Erwin, widow of Nicholas Wilson, Anne Erwin, wife of Andrew Hynes; John B. Craighead, a natural tutor, J. Erwin Craighead, Thomas Craighead, John Erwin, Charles Henry Dickenson, grandson of Joseph Erwin, each for one-seventh part of the other half; and that the judgment so rendered against the heirs of Zacharie, shall be satisfied as follows: Philip Theodore Felix Zacharie, Harriet Sophia, wife of Howard Henderson, Elenora Eliza Rozelle Zacharie, James W. Zacharie, Richard Relf and Theodore Shields, each for one-seventh part; and against the minors, David S. Zacharie Relf, John Sydney Relf, Daniel W. Cox Relf, James A. Relf, for the one-seventh part, if so much be inherited by them from their maternal grand mother, widow Zacharie, or for so much of said seventh part as they may so inherit; and it is further ordered, that the plantation and slaves mentioned in the petition, sold by the plaintiff to Joseph Erwin, by act dated March 27, 1821, before M. De Armas, notary public, said plantation situated in the parish of Iberville, about thirty leagues above this city on the right bank of the river Mississippi, having from fifteen to sixteen arpents in front on the said river, with the necessary depth to comprise the quantity of two thousand seven hundred and ninety-six superficial arpents, with the following slaves, to wit: Bernard, Lucib, Noel, Sandy, Molly, Celestin, Ive, Zenon, Octobre, Valentin, Apollon, Clemenu, Celestin, Montplasin, Le Veille, Monday, Manarme, January, Napoleon, Marie Louise, Zue, Marie, Louis, Sally, Lorinda, Obadiab, Jenny, Tenlin, Fanny and Guy; and the following additional slaves, to wit: Peter, Rages, Edward, Jeffry, Sam, Abraham, Charles, Charles, David, Polly, Mariel, Lucy Anne, Milly, Courtmay, Eliza, Charlotte, Lydia, Gandy, Milly, Fanny, Celestin's child, Sam, and Lucy's child, specially mortgaged for the payment of the said debt of twenty thou-

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sand dollars, with interest, &c.; that the said mortgage be declared executory against the heirs of the said widow Stephen Waters Zacharie; and that the said plantation and slaves now in the possession of Theodore Zacharie, one of said heirs, be seized and sold according to law, to satisfy said debt and costs; but that no execution shall issue on this judgment until the plaintiff shall file in court, as he offered to do on the trial of the cause, his bond with security to the satisfaction of the court, against any claim of the heirs of P. Belly, in John Baptiste Belly, surnamed De Lorme, and Marguerite Belly, to the plantation and slaves aforesaid.

It is further ordered and decreed, that the judgment affirming the security rendered in the case be reversed, and the cause on this point remanded to the District Court, with direction to the judge, not to refuse the defendants permission to take down in court, the evidence which they may offer in support of their exceptions; and it is further ordered, that the appellees pay the cost of this appeal.

RYDER vs. ADAMS ET AL.

Actions for false imprisonment in consequence of affidavits made by creditors in suits against their debtors should be cautiously entertained, and clear proof is requisite of intention to oppress by resort to a legal remedy to enforce a just claim.

The plaintiff in this suit was the defendant in another, in which judgment had been rendered against him; an appeal staying execution had been taken, and he had subsequently been arrested and imprisoned during one day on an affidavit falsely and maliciously taken, as is alleged, by Kilkenney, as the agent of Mrs. Adams, the plaintiff in that suit, and with Kilkenney, the defendants in the present action. One thousand dollars in damages were claimed for this false imprisonment.

The defendants pleaded the general issue, denied all malice, and averred the legality of their proceedings.

It appeared on the trial, that the plaintiff had resided in the city of New-Orleans for several years; was the reputed owner of a grocery and of several slaves, and had manifested no disposition to leave the city. He had a short time previously confessed judgment for two hundred dollars. Judgment was rendered against the plaintiff, and he appealed.

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PORTER, J. delivered the opinion of the court.

This is an action for false imprisonment. The plaintiff was arrested on an affidavit made by Kilkenney, who was the agent of Mrs. Adams. He swore that Ryder was about to remove from the state of Louisiana, without leaving therein sufficient property to satisfy the demand which the defendant, Mrs. Adams, had against him.

This oath is charged to have been falsely and maliciously taken. The facts which appear on the record establish, that at the time the present plaintiff was arrested, judgment had already been obtained against him, from which judgment he had taken a suspensive appeal, and furnished security to satisfy the decree of the appellate tribunal. He had a grocery store though not of extensive kind, and was the owner of a family of slaves which he had purchased of the defendant, Adams, and had paid for them eight hundred and fifty dollars. Persons who profess to have enjoyed his intimacy, and who were acquainted with him, swear that they had no idea he intended to leave the state at the time he was arrested. On the other hand, it is shown that a short time after the imprisonment, the plaintiff was sued for a debt of two hundred dollars, and that he confessed judgment for the amount claimed.

On the facts, the judge below gave judgment for the defendants, and we are unable to say it should be reversed. It is true that the remedies given by law to creditors to enforce their claims ought not to be wantonly and oppressively exercised; and it is also true that from want of probable cause,

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Actions for false imprisonment in consequence of affidavits made by creditors in suits against their debtors should be cautiously entertained, and clear proof is requisite of intention to oppress by resort to a legal remedy to enforce a just claim.

malice may be presumed. But actions of this kind should be cautiously entertained, and the proof should leave the mind free from doubt, that the resort to a legal remedy, to enforce a just claim, was to oppress the defendant. That produced here has not had such effect on us. The circumstance of security being already furnished on the appeal bond has weighed most with the court. It is asserted, but not proved, that the surety on the bond has since become insolvent, and has absconded. Admitting he was a responsible person, and such as the law requires, and such we must take him to have been, still the plaintiff in the former suit had a right to the responsibility of the appellant also, and to take all means to secure it. The fact of a man in such business as the plaintiff is stated to be, suffering himself to be sued for a just debt for so small a sum as two hundred dollars, certainly shows a state of his affairs, which if known to the defendants, would have furnished good cause for suspicion that he was not solvent; and from that conclusion the inference is not strained, that he may abscond. On the whole, we do not feel authorised to reverse the judgment below; and it is, therefore, ordered, adjudged and decreed, that it be affirmed, with costs.

Preston, for appellant.

L. C. Duncan, for appellee.

BURKE vs. ERWIN.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE THEREOF PRESIDING.

The certificate furnished by the judge of the inferior court, after judgment, is insufficient, although the statement he makes, is drawn from his notes taken of the evidence.

The opinion of the court, containing a statement of facts, was delivered by **PORTER, J.**

A motion has been made to dismiss this appeal, for want of such certificate as will enable the court to examine the case on its merits.

That furnished by the clerk is clearly insufficient, and its defect has been attempted to be cured, by one obtained from the judge eight months after judgment was signed in the court below. It is in these words:

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"I, Charles Watts, Judge of the Fourth Judicial District of the State of Louisiana, certify, that the record of the case of John J. Burke, against Lavinia Erwin and others, heretofore pending in the court of said district, for the parish of Iberville, and tried before me, contains all the matters and things upon which said cause was tried in the first instance. Considering the statement of facts in said case, as in lieu of evidence taken down by the clerk, so far as said statement refers to parol evidence given at the trial."

We have decided, a statement of facts cannot be made out after judgment. It is attempted to take this case out of the general rule, because the judge states at the commencement of the document furnished by him, that his statement is drawn from his notes taken of the evidence. This certainly diminishes, in some measure, the danger on which the rule was founded, but does not remove it. There is great difficulty even under the most favorable circumstances, of communicating truly to an Appellate Court, the facts in the same light they were presented to the tribunal which tried the cause in the first instance. That difficulty increases with time. The notes of a judge are not matter of record. They are sometimes carefully, and at other times, negligently preserved. They are taken down differently by different judges. Some note the evidence fully, others content themselves with writing out those parts of it which they consider material. If an error be committed in the use of such materials before judgment, it can be immediately corrected. Every thing which attended the investigation, is then fresh in the minds of those concerned; the parties can call to the recollection of the judge, matters which he may have omitted, or correct errors in those he has detailed; and his own recollection being more complete then than at a subsequent time, he can more properly judge how far the alleged inaccuracies are real or assumed. We think there would be great danger in permit-

The certificate furnished by the judge of the inferior court, after judgment, is insufficient, although the statement he makes, is drawn from his notes taken of the evidence.

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EASTERN DISTRICT. ting such a practice. *See case of Trenchard vs. Elderkin, 3 La. Rep. 294.*
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**ELLIOTT,
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 WHITE.**

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed with costs.

Peirce, for appellant.

Davis, for appellee.

ELLIOTT, ADM'R. &c. vs. WHITE.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The surety of a curator of absent heirs, may be sued on the bond in the District Court.

The representative of those, for whose benefit a bond was given to the Judge of Probates, as their trustee, can sue on the bond without an assignment of it.

The defendant was sued as one of the sureties in a bond to the Parish Judge, by John A. Foote, as principal, curator of the plaintiff's deceased father. It was alleged that the curator had converted to his own use, five thousand dollars belonging to the estate, and to recover this sum from the surety, this action was brought.

The defendant filed several exceptions, which were overruled; and he answered, avering that the money claimed was lost, owing to the improper discharge of the curator, and the neglect of the attorney representing the absent heirs.

Judgment was rendered for the plaintiff, and the defendant appealed.

Peirce and McCaleb, for appellants.

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vs.
WHITE.

1. The District Court has no jurisdiction of the cause, the same belonging to the Court of Probates, in and for the parish and city of New-Orleans. *C. P. art. 924-9.*

2. In the said Court of Probates a suit is now pending for the same cause of action, and yet undetermined.

3. The bond sued on, is given to the judge of the Court of Probates and his successors in office, and the same has never been assigned to plaintiff, and he has no legal authority to sue on the same.

4. A suit cannot be instituted on the said bond, until the parties to it have been called upon to comply with its conditions, and asked to render an account, and have been put in delay for not doing so.

5. The heirs of the said Elliott, since the institution of this suit, have instituted proceedings against Labarre and others, to recover, and have recovered the very property, or at least a part of it, for the disposition of which, and the alleged not accounting for it, the appellants are sued, as succeeding to the responsibilities of Foote, the administrator; and if judgment is rendered in this case, the heirs of Elliott will recover the property sold, and the price for which it was sold.

Hennen, contra.

The opinion of the court was delivered by MARTIN, J.

The defendant and appellant complains of a judgment rendered against them, as surety of a former curator of the estate of Foote, in favor of the present.

1. His counsel has urged that the District Court was without jurisdiction, and he was suable in the Court of Probates only.

2. A suit was actually pending in the Court of Probates against him on the bond.

3. The bond was given to the judge of Probates, and was never endorsed or assigned.

4. His principal was never called on to account, and was never put in mora.

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POYDRAS
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The surety of a
curator of absent
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The representa-
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bates, as their
trustee, can sue
on the bond with-
out an assignment
of it.

The counsel has not alleged, and we are unacquainted with any law, which takes a case like the present, from the jurisdiction of the ordinary tribunals. The Court of Probates is one of limited jurisdiction, which cannot be extended to any case not especially placed within its attribution.

The present plaintiff is not a party to the suit depending in the Court of Probates.

3. The suit is brought by the curator who represents the creditors and heirs, for whom the judge of Probates, as the counsel took the bonds, and the curator who represents them, may sue on the bond, in the same manner as a principal can bring an action on a contract made for him by his agent.

4. The bond is conditioned for the due and faithful administration of the estate. The breach it assigned, is a failure therein, it became the duty of the defendant, to show a due and faithful administration of the estate by his principal.

All these exceptions were properly overruled in the District Court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

POYDRAS ET AL vs. PATIN.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE THEREOF
PRESIDING.

The action against a surety on an injunction bond arises *ex contractu*, and as to prescription must be governed by the laws which operate upon written contracts.

Interest will not be awarded on damages sustained during the suspension of an order of seizure and sale, in consequence of an injunction wrongfully sued out.

This action was brought against the widow of Pierre Abadie, in her own behalf, and as tutrix to his sole heir, on the following bond:

"State of Louisiana—parish of Point Coupée. Know all men by these presents, that we, Pierre Abadie, and Gertrude Patin, wife of Pierre Abadie, as principal, and Antoine Patin, as security, do hereby bind ourselves, our heirs, executors and administrators, unto Charles Morgan and Benjamin Poydras de la Lande, in the sum of three thousand eight hundred dollars, dated this thirteenth day of July, 1827. Whereas, the above bounden Pierre Abadie, and Gertrude Patin, have on the sixth day of August, 1825, obtained an order of injunction on a writ of seizure issued at the suit of *Morgan & Poydras vs. Pierre Abadie & wife*. Now, therefore, the condition of the above obligation is for the payment of all such damages as this said Morgan and Poydras may suffer in case it should appear that the said injunction was wrongfully sued out." It was signed by the obligors in the presence of four witnesses.

A statement of the pleadings and evidence is given in the opinion of the court.

Cuvillier, for appellants.

1. The damages suffered by the plaintiffs by reason of the injunction wrongfully obtained, are the interests at ten per centum, stipulated in the bill of sale from the end of March, 1823, on twelve hundred dollars till paid; and from the end of March, 1824, on six hundred dollars till paid.

2. These damages need not be proved otherwise than by producing the bill of sale in which the stipulation of the aforesaid interest is at full length; said bill of sale speaks for itself.

3. The plaintiffs were not bound to show that the debtor had become insolvent, and that by reason of the delay had lost a part or the whole of their debts.

4. A judicial surety cannot demand the discussion of the property of the principal debtor. *Louisiana Code*, 3039.

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PATIN.

5. The action on an injunction bond is not one of those which are prescribed by one year. *Louisiana Code*, arts. 3469, 3900, 3901.

6. The praying for and obtaining an injunction is neither an offence nor a *quasi* offence.

7. And, to be security on an injunction bond, is still less an offence, or *quasi* offence, than to pray for and obtain it.

Mitchell, for appellees.

1. The verdict of the jury is not justified by the evidence, even should the interest be allowed at ten per centum.

2. The interest claimed as damages could not exceed five per centum; the charge of the District Judge is erroneous.

3. The defendant's plea of prescription was well sustained, and must prevail in this court.

MATHEWS, J. delivered the opinion of the court.

This is a suit on an injunction bond, in which the plaintiff claim damages from the representative of the estate of a surety in said bond, who died before the right of action accrued. The general issue is pleaded in the answer, and also prescription. The cause was submitted to a jury who found a verdict for the plaintiffs, and assessed their damages at eleven hundred and ninety-four dollars. The question of prescription, had however, been reserved for the decision of the judge *a quo*, who decided in favor of the defendant, and the plaintiffs appealed.

The whole case is brought up on the appeal; but the first step necessary for us to take, is to examine the correctness of the decision of the judge by which he sustained the plea of prescription. The prescription relied on by the defendant is, that of one year as provided by the article 3501 of the *Louisiana Code*, wherein it is declared that "actions for injurious words whether verbal or written, and those for damages caused by slaves or animals, or resulting from offences or *quasi* offences, &c., are prescribed by one year. The

latter clause of this article is alone applicable to the present case; and suggests the question whether this action is to be considered as arising *ex contractu* or *ex delictu*. In our view it evidently originates from a contract. The right which suitors have to obtain injunctions, is recognised by law, and the requisites to obtain them are pointed out in the article 304 of the *Code of Practice*. A bond with surety is to be given in favor of the defendant to secure the payment of damages. By such bond both the principal and surety contract an obligation to pay such damages as may be sustained by the defendant, &c. An act authorised by law cannot be viewed as an offence, or *quasi* offence. According to moral and legal principles, it is the violation of sound morality, or of the rules of law which constitutes an act or omission, an offence or *quasi* offence. Where there is no law there can be no transgression.

We are clearly of opinion that the obligation to pay damages in the present instance, was created by the injunction bond. It is virtually a written promise made by the plaintiff and surety in that case, to pay to the defendants any damages which might be sustained by them in the event of a decision that the injunction had been wrongfully sued out, and must be governed by rules of prescription relating to written obligations or promises.

Being of opinion that the judge *a quo* erred in sustaining the plea of prescription, it becomes necessary to examine the principles on which damages ought to be awarded.

The present plaintiffs obtained an order of seizure and sale of certain slaves which they had sold to one Pierre Abadie, having stipulated a mortgage on the property sold, to secure the payment of the price and interest, at the rate of ten per centum per annum, from certain dates. This order was stayed by an injunction granted at the instance of the wife of the vendee, under some pretence of claim to the property seized on the sixth of August, 1825, and a bond was given on the ninth of the same month in which the husband of the present defendant became surety on July 13, 1827. This injunction was dissolved on May

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The action against a surety on an injunction bond arises *ex contractu*, and as to prescription must be governed by the laws which operate upon written contracts.

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PATIN.

Interest will not be awarded on damages sustained during the suspension of an order of seizure and sale, in consequence of an injunction wrongfully sued out.

29, 1828, and the day after an alias order of seizure and sale issued, under which the slaves in question were sold by the sheriff, and produced according to his return, one thousand nine hundred and sixty-five dollars, gross, leaving nett, after deducting charges, one thousand eight hundred and sixty-three dollars and three cents. This sale was made on July 3, 1828. The property was sold by the sheriff of the parish of New-Orleans, and no return made until November 30, 1829. Poydras, one of the plaintiffs, was the purchaser at sheriff's sale. These slaves were originally sold to Pierre Abadie, for one thousand eight hundred and sixty dollars. By the contract, interest was stipulated to be paid on this amount at the rate of ten per centum per annum, on twelve hundred dollars, from April 1, 1823; and on six hundred and sixty dollars, from April 1, 1824, until April 1, 1825; and after this last period, interest on the whole amount of price until paid. The whole amount of interest on the price calculated on the principles above stated, amounted on July 30, 1828, when the property was sold by the sheriff in New-Orleans, to nine hundred and ten dollars and fifty cents; this, together with court charges, (amounting to seventy-eight dollars and fifty cents,) produces an aggregate sum due by the purchaser of the slaves, of two thousand eight hundred and forty-nine dollars, on August 1, 1828. At that period the sum of one thousand eight hundred and sixty-three dollars, the net proceeds of the sale of the slaves, must be considered as having been paid to the plaintiffs, one of them being the purchaser at sheriff's sale. This sum taken from two thousand eight hundred and forty-nine dollars, leaves a balance due to them, amounting to nine hundred and eighty-five dollars, which is fairly the amount of damage suffered in consequence of the delay in collecting that debt, caused by the injunction. They now claim interest on this sum at ten per cent. to the period at which the judgment was rendered in the present case. To this we are of opinion they are not legally entitled. The injury or damages which they were suffering under the injunction ceased at its dissolution; at all events at the time when the property was sold and they had

received the price. The damages which had accrued down to the time when the slaves were sold, constitute an unliquidated claim, and no obligation to pay conventional interest arises out of the injunction bond. An agreement to authorise the recovery of such interest, must be an express written promise to pay it.

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LE BLANC,
JUDGE, ETC.

We are, therefore, of opinion, that there was error both in the judgment and verdict of the jury in the court below; consequently, it is ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and the verdict set aside; and it is further ordered that the plaintiffs and appellants do recover from the defendant and appellee, the sum of nine hundred and eighty-four dollars, with costs in both courts.

THE STATE OF LOUISIANA vs. LE BLANC, JUDGE, &c.

APPLICATION FOR A MANDAMUS.

The right to have a mortgage cancelled by order of a judge of the Court of Probates, cannot be tested, unless those who have a real or pretended interest, are made parties.

Mrs. Widow Rillieux, natural tutrix to her minor children, had sued them, and obtained judgment for sale and partition of a plantation, which they owned in common and undivided, and on which there existed the legal mortgage against her as tutrix of the children, and several conventional mortgages. In order that she might give a clear, unincumbered title, to the purchasers at the public sale ordered, she applied to the judge of the Court of Probates, for the parish of St. John the Baptist, before whom the proceedings had been conducted,

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ERWIN
vs.
BUTLER.

The right to have a mortgage cancelled by order of a judge of the Court of Probates, cannot be tested, unless those who have a real or pretended interest, are made parties.

for an order to erase and cancel the mortgages. The judge refused to grant this order, and she applied for a mandamus.

PORTER, J. delivered the opinion of the court.

This is an application for a mandamus to the judge of Probates to *St. Jean the Baptiste*, to compel him to grant an order to erase and cancel some mortgages on property which the applicant has purchased at a sale made under the authority of his court. We are of opinion that this question cannot be decided with the judge, but that it must be by a proceeding, to which those having an interest, real or pretended, adverse to the application, are made parties. The rule must, therefore, be discharged.

Morphy, for applicant.

Pichot, for defendant.

ERWIN vs. BUTLER.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

A master of a vessel coming from abroad, does not establish his domicile in the city of New-Orleans, by taking rooms there while his vessel is in port.

If a party has had two verdicts on a question of fact, this court will not interfere, unless a very strong case indeed is presented.

The sum which the master of a vessel pays a sailor on discharging him in a foreign port, is separate and distinct from wages.

The plaintiff, former mate of the brig *Latona*, sued the master and owner for his wages from the time he was dis-

charged from the brig at Trieste, until he arrived at the city of New Orleans, where he had been shipped. He also claimed damages, in consequence of the defendant having previously to his discharge, assaulted, beaten, and kept him in irons during ten days.

The defendant pleaded a general denial, and prayed for a trial by jury. A verdict was found for the plaintiff for three hundred and seventy-three dollars and seventy-eight cents for wages, and five hundred dollars as damages for the assault and battery, and confinement. Judgment having been rendered, the defendant appealed.

De Armas, for appellant.

1. The case ought to be remanded for reasons mentioned in the bill of exceptions.

2. The judgment of the court and verdict of the jury, ought to be reversed, because the defendant ought to have been creditors of the sum of sixty dollars received by Erwin from the hands of the American Consul at Trieste, and deposited in the hands of the American Consul by defendant.

3. Judgment ought to have been rendered in favor of the defendant, because no injury has been done to appellee, and because the captain of the vessel was authorized to inflict upon plaintiff, the punishment which his conduct deserved.

Roselius and McMillen, for appellee.

1. The decision of this case depends almost entirely on questions of fact, which were properly submitted to and decided by the jury. Two juries have decided the case.

2. The mate of the vessel is a respectable officer, and is not to be treated with the same harshness and severity as a common mariner. *Peters' Admiralty Rep. vol. 1, p. 246. 5 Mason's Rep. p. 462.*

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KRAWIN
VS.
BUTLER.

The opinion of the court was delivered by **MARTIN, J.**

The defendant is appellant from a judgment, by which damages have been recovered from him, for his beating and ill treating the plaintiff at sea, on board of a vessel, of which the latter was mate, and the former master.

The reversal of the judgment has been claimed on the ground, that the depositions of several witnesses were irregularly taken, as the notice of the trial and place of taking them, was left for the defendant on board of the vessel he commanded, although, as is alleged, he had in the plaintiff's own knowledge, a domicile in the city. The fact is, that the defendant, who arrived in New-Orleans from Philadelphia, on board of the vessel he commands, took furnished rooms in the city, and the notice was left on board of the vessel, under the provision of the *Code of Practice*, 199. It does not appear to us, that the circumstance of a master of a vessel coming from abroad, taking while the vessel is in port, rooms in the city, establishes his domicile there, and that the defendant was regularly notified by the notice left on board.

A master of a vessel coming from abroad, does not establish his domicile in the city of New-Orleans, by taking rooms there while his vessel is in port.

If a party has had two verdicts on a question of fact, this court will not interfere, unless a very strong case indeed is presented.

On the merits, the question is merely one of fact, and the plaintiff had two verdicts. In a case like this, a very strong case indeed, is to be made, before we can be induced to interfere, and we see no ground to be dissatisfied with the jury's finding, especially as it appeared to us, that even if the depositions, to which objections have been made on the trial of an alleged irregular service of notice, were rejected, the other testimony would support the verdict.

The plaintiff was discharged in a foreign country, and received from the American Consul, his proportion of a sum of money paid by the defendant in the consul's office on his discharge, according to the act of congress. *Ingersoll*, 146.

The sum which a master of a vessel pays a sailor on discharging him in a foreign port, is separate and distinct from wages.

It has been contended, this sum ought to have been deducted from that allowed to the plaintiff for his wages. We are of opinion, that the sums paid by masters of vessels on the discharge of a sailor in a foreign port, and of which he receives his share, is, above any money due for wages, *i. e.* a compen-

sation for loss of time in procuring a passage for the sailor's return. **EASTERN DISTRICT, March, 1832.**

**BOIMARE
vs.
TOBY.**

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

BOIMARE vs. TOBY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

A contract entered into by one party with a person acting as the agent of the other, subjects the agent to no liability, unless he has specially bound himself, or exceeded his authority without showing it.

In this action damages were claimed of defendant, acting as the attorney in fact for the lessor, for breach of a lease of a house and lot in Camp-street, in the city of New-Orleans, in refusing to give the plaintiff and lessee possession of the premises at the time fixed in the lease. The defendant pleaded that he acted as the agent of Thomas Mellon, the lessor, to the knowledge of the plaintiff; and afterwards answered, avering the nullity of the lease, on the ground of error, and certain statements of plaintiff, by which defendant had been induced to enter into the contract. The jury found for the plaintiff. The defendant appealed.

Carleton and Lockett, for appellant.

1. The court below erred in overruling the exception pleaded by defendant, to wit: That he acted as agent, which agency was known to plaintiff; expressed in the act of lease sued on, and stated in plaintiff's petition, that plaintiff was agent.

2. Defendant relies on his bills of exceptions.

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3. There is no evidence of any damages having been sustained by plaintiff.

Pichot, for appellee.

MARTIN, J. delivered the opinion of the court.

The petition states that the defendant, as attorney of Mellon, leased a house to the plaintiff and engaged to put him in possession, and afterwards refused to do so, whereby the plaintiff sustained damages, which he claims from the defendant, who, among other pleas, urged that he acted merely as the agent of Mellon, to the knowledge of the plaintiff, and therefore incurred no personal responsibility.

The plaintiff had judgment, and the defendant appealed.

It appears that at the trial, the defendant's counsel requested the parish judge to charge the jury, that the defendant was not liable to the plaintiff, in the manner charged in the petition, because he acted as agent; and the verdict, according to law, ought to be for the defendant. But the court refused, and a bill of exceptions was taken.

A contract entered into by one party with a person acting as the agent of the other, subjects the agent to no liability, unless he has specially bound himself, or exceeded his authority without showing it.

The case is too plain a one for argument; the parish judge erred, and the action cannot be sustained. Our *Civil Code* contains a textual provision to this effect. "The man alone is responsible to those with whom he contracts, only where he has bound himself personally, or where he has exceeded his authority, without having exhibited his powers," 2982.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and that there be judgment for the defendant, with costs in both courts.

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HENSHAW ET AL. vs. ROLLINS.

HENSHAW
ET AL.vs.
ROLLINS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

For necessary supplies furnished a vessel, the master, the owner or freighter, and the vessel are liable; and by charging either, the liability of the others is not destroyed.

The facts of the case are stated in the opinion of the Court delivered by MARTIN, J.

The defendant is appellant from a judgment, by which the plaintiff recovered from him, as master of the brig Sarah, the amount of disbursements made at his request by them, for the brig, for the account not of her owner, but of persons who had chartered her.

The counsel of the plaintiff has held, that by the grand principles of mercantile law, the master is liable for the disbursements of the vessel, unless relieved from the responsibility, by the express terms of the contract. *Holt on Shipping*, 319. *Abbott*, 135, N. S. *Livermore on Agency*, 267. *Paley*, 305. He has contended, the special engagements of the master appears, many of the bills having been paid by his written order. That the defendant cannot avail himself of a plea of novation, as this mode of extinguishing a debt, cannot be presumed, and must be express and unequivocal. *Civil Code*, 2186. *Hobson et al vs. Davidson's Syndic*, 8 *Martin*, 430. *Gordon vs. Macarty*, 9 *ib.* 268. *Bacon vs. Stone*, 2 N. S. 144. *Mark vs. Rogers*, 4 *ib.* 97.

This case has been endeavored to be distinguished from others, by the circumstance of the master's acting for the charterers of the brig; but we concur in the opinion of the first judge, who held that the charterers were mere temporary owners of the brig, and the master put on board by them, stood to the persons who furnished supplies for the brig, in the same relation, as a master appointed by the owner.

It has been contended, that the plaintiffs charged the

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For necessary supplies furnished a vessel, the master, the owner or freighter, and the vessel, are liable, and by charging either, the liability of the others is not destroyed.

amount of the disbursements he now claims from the defendant, to his employers, the charterers of the brig. For necessary supplies for a vessel, the remedy of the party is against the ship, the master, and owner or charterer. He loses not either his remedy against the vessel or either of these persons, by charging the other; for he may simultaneously or at different periods, charge them all, there is no novation by implication.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

Grymes, for appellant.

Slidell, for appellees.

SHEPHERD & CO. vs. LANFEAR.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A cause will not be remanded, because evidence has been improperly admitted, if on other grounds, the judgment of the inferior court should be sustained.

The acts of a foreign power controlling the place where freight is to be delivered, may modify and delay the performance of a contract of charter party.

If the foreign prohibition to land a cargo be conditional, the freighter cannot refuse to receive it, on the ground, that by receiving it, he sustains more inconvenience and expense, than he would sustain if the vessel should perform quarantine, and then land it at the usual place.

If foreign laws change the place of delivery in case of quarantine, the freighter must receive the cargo at the place where the law requires.

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March, 1829.

SHEPHERD
& CO.
VS.
LANFEAR.

This action was brought by the owners of the ship *Shepherdess*, against the freighter, for a voyage to Alicant, in Spain, on breaches of a contract of charter party, which is in the following words: "*Memorandum*.—It is agreed between the undersigned, as follows.—That R. D. Shepherd & Co., charter the ship *Shepherdess*, Cook, master, to Ambrose Lanfear, who taketh the said vessel on charter, to carry a full and entire cargo of tobacco, in hogsheads, from this port of New-Orleans, to Alicant, in Spain, for the freight of one cent per pound, gross shipping weight, with five per cent. thereon for primage; such freight and primage, to be paid in current specie. The cargo to be furnished on the levee of this city, weather permitting, as fast as the vessel can take it in, and to be received at Alicant from the tackles of the vessel, at the charterers expense and risk, within twenty-five working days from the time the vessel shall be ready to discharge; the vessel being at the customary place of discharge for vessels of her burthen. For any further detention, demurrage at the rate of thirty dollars per day, to be paid daily as the same shall become due; the vessel to be consigned at Alicant to the consignee of the cargo, who shall be entitled to customary commissions for doing the business of the vessel."

"New Orleans, 16th July, 1829."

(Signed)

AMB. LANFEAR,
R. D. SHEPHERD & CO.

The plaintiffs aver a performance of the contract on their part, and that the defendant refused to receive the cargo at Alicant; that he required the ship to proceed to the port of Mahon, and that in consequence of his detention of the ship, and omission to pay the full amount due for her freight, he caused the plaintiffs to suffer damages, amounting in all to eleven thousand five hundred and seventy-one dollars and fifty cents. The general issue was pleaded.

Judgment was rendered in the court below for the plaintiff, for the sum of two thousand seven hundred and thirty-nine dollars and fifty cents, from which, after an ineffectual attempt to obtain a new trial, the defendant appealed.

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March, 1833.

SHEPHERD
& CO.
VS.
LANFERN.

PORTER, J. delivered the opinion of the court.

The petitioners state that they chartered their vessel called the *Shepherdess*, to the defendant, to carry a full and entire cargo of tobacco, in hogsheads, from the port of New-Orleans, to Alicant, in Spain, the cargo to be furnished at the levee in the former place, and to be delivered at the latter from the tackles of the vessel, at the charterer's expense. That in pursuance of said agreement, they did receive a cargo of tobacco on board, and carried the same to Alicant, but that the defendant refused to receive the cargo, and in consequence of his refusal, the petitioners were compelled to carry it to Port Mahon, perform quarantine with their vessel, and then reship the tobacco to Alicant.

They aver that the damages they have sustained by this act of the defendant, amount to eleven thousand five hundred and seventy-one dollars and fifty cents, and for which, they pray judgment.

The answer of the defendant, consists of a general denial. The cause was tried by a special jury, who found a verdict in favor of the plaintiffs, for two thousand seven hundred and thirty-nine dollars and fifty cents. An unsuccessful attempt was made to obtain a new trial, and the court below having rendered judgment in conformity with the verdict, the defendant appealed.

The difficulty in this case has grown out of the sanitary laws of Spain. Previous to the arrival of the ship in the port of Alicant, intelligence had been received there, that the yellow fever existed in New-Orleans, and her cargo could not, in consequence of the quarantine regulations of that port, be landed at the usual place of discharge, opposite the city. Orders were given, that the vessel should proceed to Port Mahon, there to undergo quarantine, but permission was given, to land the tobacco at two places adjoining the town of Alicant; namely, Babil and Albufereda; the latter is distant three miles from the city; the former quite adjacent to it. On this order being issued, the captain offered to deliver the cargo according to the stipulations of the charter party.

The agent of the defendant refused to receive the tobacco at either of these places, alleging that it was not a convenient place of discharge, and as the property would be subject to great and dangerous exposure, at the time of debarkation and afterwards. In consequence of this refusal, the vessel was compelled to proceed to Port Mahon and land her cargo. After the usual delays, it was again taken on board, and finally delivered at Alicant.

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SHEPHERD
& CO.
OF
LANEYER.

The case, therefore, turns on the legality of the act of the defendant's agent in refusing to receive the cargo.

But before that question is examined, another presented by a bill of exceptions which appears on record, must be disposed of.

By the terms of the charter party, the consignee of the cargo was entitled to the customary commissions for doing the business of the vessel. It appears to have been a matter of contest in the court below, as it has been the subject of argument here, whether, by this agreement, the factor of the cargo did not become also the agent of the ship, the parties deducing consequences important to their rights on either hypothesis. To sustain the ground assumed by the plaintiffs, that the agent was not to have any control of the vessel, and that the commissions promised, were merely intended as an inducement to the defendant, to enter into the contract of charter party, they offered in evidence the letter of instructions to the captain of the vessel on departing from this port, and the oath of a witness, who was their book-keeper, that they kept regular mercantile books, and that there was not in the letter book, a copy of any letter to the agent of the cargo. This testimony was objected to, but admitted by the judge who tried the cause.

We find it unnecessary to express an opinion on the correctness of the decision of the court below on this point, for if we were to conclude it was erroneous, we should not feel authorized to remand the cause. Admitting the plaintiffs did not consider the agent of the cargo the agent of the ship, we are of opinion that even on the supposition that he was the latter, the defendant is responsible if the same person who was agent

A cause will not be remanded, because evidence has been improperly admitted, if on other grounds, the judgment of the inferior court should be sustained.

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of the latter, refused to receive it. A case cannot be remanded for an error in admitting proof of a fact, when on distinct and different grounds, the legal responsibility of the party to whom the evidence is opposed, is the same, independent of that fact.

It has been contended that *Time Le Vedras*, a merchant in Alicant, to whom the cargo was consigned, was also consignee of the ship, and that, consequently, one of the joint principals cannot be responsible to the other, for the act of their common agent: or that there was such an incompatibility in the authority conferred on him, in case a conflict arose between the interests of the plaintiffs and defendant, that he could not act for either.

We see no reason, whatever, for considering this as a case of joint mandate, unless the circumstance of an agent receiving separate powers in relation to different things from parties having interests which may clash during the agency, can constitute a joint power, which it is clear they do not. The mandatory in this case was the agent of the plaintiffs for the ship, and of the defendant for the cargo. The powers were separate; the interests were distinct; the objects were different; and in case this difficulty or a similar one had not occurred, he could have discharged the duties of agent for each with perfect propriety; indeed, the very circumstance of the performance of the agency, producing a direct conflict between the duties which he owed to his respective principals, is conclusive against the idea, that they were his joint mandators.

As to the incompatibility of his obligations in case of an opposition of interests in those he represented, which disabled him from acting for either, we do not perceive much difficulty in the objection. If it were true, we see no other consequence to result from it, save that the party who was in fault from the want of an agent to act for him, must bear the consequences of such want. The risk that a conflict of interests might arise, was known to both parties, and if they chose to place themselves in a situation where one might be responsible to the other from not attending either in person, or by an agent, they must make good the consequent damage. Whe-

ther the non delivery was owing to the improper conduct of an agent who had competent powers, or to the failure to appoint an agent with competent power to act for the defendant, the result would be the same.

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But be this as it may, it is clear that the agent in this instance, as in any other of a similar kind, where a conflict of interest arises between the principals from whom he has mandates, may choose to act for one of them. That he acted in this case contradictorily with the captain, who insisted on pursuing the course most advantageous to the ship owners, results we think, manifestly, from the whole of the evidence in the cause. The captain negatives the idea, that any orders were received from him as consignee of the ship, by swearing that he did not act as agent of the ship owners, and his conduct, through the whole transaction, if it required explanation, waives it, in an answer made by him to a request of the captain, after the vessel had returned from Port Mahon, and delivered her cargo. He was called on by the master to assist him in recovering the freight, and he answered, that he could not act as agent for the owners of the vessel, he being agent of the owners of the cargo.

The clause in the charter party, in relation to the delivery of the cargo, reads thus:—"To be received at Alicant from the tackles of the vessel, at the charterer's expense and risk, within twenty-five working days from the time the vessel shall be ready to discharge; the vessel being at the customary place of discharge for vessels of her burthen." The evidence shows that Babil is not the customary place of discharge for vessels in the port of Alicant, not placed under quarantine, but that it is the customary place of discharge for goods which are considered non-contagious, and which are permitted to be landed from vessels ordered to perform quarantine at Port Mahon or elsewhere, where there is a lazaretto. The question for our decision, is, whether the customary place of discharge mentioned in the charter party, must not be understood to be the place, where, under the circumstances existing at the time, the vessel arrives in port, she is permitted to discharge. *Valin* and *Boulay Paty*, both state, that if the acts of a foreign

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The acts of a foreign power controlling the place where freight is to be delivered, may modify and delay the performance of a contract of charter party.

If the foreign prohibition to land a cargo be conditional, the freighter cannot refuse to receive it, on the ground, that by receiving it, he sustains more inconvenience and expense, than he would sustain if the vessel should perform quarantine, and then land it at the usual place.

If foreign laws change the place of delivering in case of quarantine, the freighter must receive the cargo at the place where the law requires.

power, which regulate and control the place where the freight is to be delivered, present an indefinite obstacle to the performance of the charter party, it is dissolved, but that if the obstacle is temporary, the vessel should wait until it is removed, and that in such case, neither shipper nor owner has the right to claim damages for the delay in the non performance. This principle would seem to apply to detention under the quarantine laws as well as any other; and it may, therefore, be assumed, that foreign regulations may delay the performance of the contract. If they have that force, it is difficult to say why they should not have the power to modify the mode of delivering within the port to which the cargo is to be carried. If the prohibition to land the cargo had been absolute, both parties according to the doctrine just stated, would have been compelled to bear the consequences, without any claim on each other. When it is conditional, the freighter has not, in our opinion, a right to refuse receiving the cargo, on the ground that he is put to more inconvenience and expense than he would be, if the vessel should perform quarantine and then land it in the usual place. The principle just stated, that both are bound by these laws, must extend to all the limitations affixed to them, and it is evident that the doctrine is not established on the ground of a supposed equality in the injury sustained by the detention; for the cases must be frequent where delay alone produces much greater damage to one of the parties to the contract than to the other. Parties are presumed to know the usages and laws of the port where the contract is to be performed, and to contract in reference to them. The mode of delivery depends much on the usage of the place where that delivery is to be made, and if the general laws of the country change the place of delivery in case of quarantine, the freighter is bound to receive it. There is a case in the English books, which is cited by Abbott in illustration of the rule, that the usages and customs of the port of delivery, modify the rights of the parties, or rather govern them under the contract. When ships, says he, arrives from Turkey, and are obliged to perform quarantine before their entry into the port of London, it is usual for the consignee to send down per-

sons at his own expense, to pack and take care of the goods, and, therefore, where a consignee had omitted to do so, and goods were damaged by being sent loose to shore, it was held that he had no right to call upon the master of the ship for a compensation. In this case, it is clear that the usages of the port under the quarantine laws, were considered to impose obligations on the owners of the goods, very different from those which would have arisen from the contract, independent of these laws. *Valin in article 8 of ordinances, titre chartre partie. Boulay Paty, vol. 2, p. 292. Story's Abbott, 249.*

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If we turn from considerations already stated, that quarantine laws are considered to enter into the contract of the parties, and that both are bound by them, and consider this case as one, where the owner of the vessel has been prevented from fulfilling the contract by the government of the country where the cargo is to be carried to, the result would, perhaps, be the same. It has been decided in the United States, that if goods are tendered to the consignee at the port of destination, but the landing of them was prohibited by the government of the country, that the freight was earned. This decision appears to have been made on the authority of the continental writers; and when the interruption is temporary, arising from internal regulation or custom-house restraints, it has been decided in England, that the freighter was answerable for the delay. 4 Dallas 455. *Holt on Shipping, 22.*

It has been contended, that the responsibility of the defendant must be limited to the number of days the vessel was detained, and that no higher damages should be given than the amount of demurrage, had she remained in Alicant; but, we are of opinion, that the party can only claim this on the detention of the ship in the port of delivery. Here, in consequence of the refusal of the defendant to receive the cargo, the vessel was compelled to sail for Port Mahon, and was detained there. The risk of this voyage, and the wear and tear of the vessel, were proper considerations of the jury.

The facts of the case in relation to Bavi being the proper place for delivery, were much controverted in the argument. The evidence is contradictory, but after an attentive consid-

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eration of it, we think it decidedly preponderates in favor of the plaintiffs. It is established that Babil is a place where it is customary to land goods situated as these were; that the goods, with some inconvenience and additional expense, might have been landed there safely, and preserved in safety. On this point, the verdict of the jury has great weight with us.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

Eustis, for appellant.

Slidell, for appellee.

ERWIN ET ALS. vs. JONES.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE THEREOF
PRESIDING.

A writ to sequester property under a mortgage which cannot yet be enforced, will not be issued where the affidavit states only that the plaintiff has a lien on the property.

The plaintiffs prayed for a sequestration of three slaves, mortgaged for their purchase money, alleging that the vendee has disposed of them to the defendant, in whose possession they now are.

The motion to dissolve the order of sequestration was sustained, and the plaintiffs appealed.

Peirce, for appellant.

1. The amendment to the *Code of Practice*, allows sequestration whenever the creditors has a lien or privilege.

2. The estate of Erwin is a privileged and mortgaged creditor, and has choice of remedy, either to proceed as against third possessor, or as against one having property on which they have a privilege and lien.

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3. Joseph Jones became debtor to the heirs of Erwin, by the act between M'Nair Jones and Joseph Jones, and the petition should not have been dismissed.

Burk and Davis, for appellees.

1. The remedy by sequestration was improper, and is not sustained by the law. *Code of Practice.*

2. The suit was properly dismissed, as the plaintiffs' demand was not due.

PORTER, J. delivered the opinion of the court.

This case comes before us on an appeal from an interlocutory judgment of the court of the first instance, setting aside a writ of sequestration, which the plaintiffs had taken out on the inception of the suit.

The defendant is the third possessor of mortgaged property, and no ground is alleged for the sequestration, save that the plaintiffs have a lien on the property in the defendant's hands.

So the question raised is whether the rights of a mortgagee creditor, can be enforced by the writ resorted to in this case.

By one of the provisions of the 275th article of the *Code of Practice*, mortgaged property may be sequestered in case it is about to be removed out of the state before the mortgage can be enforced. The creditor is required to make oath of the facts which induce him to apply for the writ. *Code of Practice*, 275, no. 6. There has been no material change in our legislation since, which does away with the necessity of complying with the rule thus prescribed. In the present case, the plaintiff has wholly failed to bring himself within it. The affidavit does not state the slaves are about to be

A writ to sequester property under a mortgage which cannot yet be enforced, will not be issued where the affidavit states only that the plaintiff has a lien on the property.

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removed, nor make any allegation that there was any necessity whatever for issuing the writ.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

MOFFAT vs. VION.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

For damages caused by the theft or robbery of a slave, the owner may be prosecuted civilly, previous to a criminal prosecution; and execution will regularly issue on the judgment, unless within three days after its rendition the slave be abandoned.

The defendant's slaves had stolen from the store of the plaintiff a quantity of dry goods, to recover the value of which this suit was brought.

The defendant excepted that the slaves were not named in the petition, and that no previous criminal prosecution had taken place. The judge *quo* sustained these exceptions and dismissed the petition. The plaintiff appealed.

MATHEWS, J. delivered the opinion of the court.

This is a suit against the owner of slaves to recover the value of certain merchandise as a remuneration for the damage occasioned to the plaintiff by a theft or robbery committed by said slaves.

The defendant *in limine litis*, pleaded two exceptions to the action. First, that the slave or slaves who were alleged as having stolen the property, were not named in the petition. Second, that the plaintiff could not maintain the present

suit until after he had prosecuted to conviction in some court having jurisdiction of the matter, as a public offence.

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The court below sustained these exceptions, and the plaintiff appealed.

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In the course of argument before this court, no reliance was placed on the first exception; and from the view which we have taken of the whole case, it is unnecessary to give any opinion on it.

In support of the correctness of the decision of the District Court in relation to the second, reliance is placed on an act of the late territorial legislation, making a part of the Black Code. The twenty-second section of this law imposes an obligation on owners of slaves to pay for the damages caused by thefts or robberies committed by the latter, leaving it optional with the former to abandon such slaves to the persons robbed in discharge of the obligation thus imposed; and the choice of abandonment is limited to five days from the day when sentence shall have been pronounced.

If this law stood in full force, or if its provisions had not been impaired and altered by subsequent laws, the decision of the court below would probably be correct. But the *Louisiana Code* contains provisions on the same subject different from those of the article above cited, more full and explicit than the prior law. Article one hundred and eighty declares, that the owners are answerable in damages for the offences and quasi offences of their slaves. The article immediately following, gives the same option of abandonment (contained in the Black Code,) of the offending slave to the person injured, but provides that such abandonment shall be made within three days after the judgment awarding such damages shall have been rendered.

Under the former law, in a prosecution for the public offence, the amount of damages sustained by the individual robbed, could not necessarily be ascertained, and before that was done the owner of the slave offending, could have no criterion by which to determine whether it might be prudent to abandon or not. And perhaps as the law was previous to the promulgation of the *Louisiana Code*, the injured person

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For damages caused by the theft or robbery of a slave, the owner may be prosecuted civilly, previous to a criminal prosecution, and execution will regularly issue on the judgment unless within three days after its rendition the slave is abandoned.

would have been compelled to pursue his claim for damages both by public prosecution and private suit. But neither the prior or posterior laws imperatively prescribe it as a duty on him to vindicate the offence as a crime against the public. Perhaps according to the provisions of the old law he could not have enforced his private rights without the aid of a conviction on account of the offence. But in pursuance of the articles of the Code, we are of opinion, that a person who suffers damages by the theft or robbery of a slave, may proceed immediately and directly against the owner of such slave and obtain a judgment in the civil suit to ascertain the amount of damages without a previous criminal prosecution, and that on a judgment thus rendered, an execution would regularly issue unless the owner of the slave should choose to abandon within three days after the rendition of the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled; and it is further ordered, that this case be sent back to said court, to be proceeded in *de novo* according to law, and that the costs of this appeal be paid by the defendant and appellee.

BARON vs. BREEDLOVE ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The transcript of the record of an appeal, returnable on the first Monday in the term, can not be filed on the second, the court having sat four days in the preceding week.

The facts are stated in the opinion of the court, delivered by **PORTER, J.**

A rule has been taken by the appellant, on the appellee, to show cause, why the transcript of the record of appeal, should not be filed.

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The appeal was granted on the 14th of February, and returnable on the first Monday of March. The record was not deposited with the clerk, until the second Monday of March. The court sat four days during the preceding week.

The transcript of the record of an appeal returnable on the first Monday in the term, cannot be filed on the second, the court having sat four days in the preceding week.

The appellant has urged several reasons why the case should be taken out of the general rule, but they are not sufficient to authorise us to do so. They show nothing which due diligence might not have guarded against. Let the rule be discharged.

Schmidt, for appellant.

WEINPRENDER vs. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The act of February 22, 1817, confers directly no privilege on undertakers for making and repairing levees.

The 3216th article of the Civil Code gives no preference for making a levee to the prejudice of persons having mortgages or privileges on the land previous to the time when the Code assumed the force of law.

By the old Code no privilege was conferred upon undertakers and makers of levees.

The District Court is not without jurisdiction *ratione materie* in a suit brought by a minor to establish his claim against his tutor, and if no objection on account of personal privilege be taken at the trial, the judgment of that court is in itself valid.

By the tablan of distribution filed in this case by the acting syndic, it appears that after deducting all the costs and ex-

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Winefrender vs. his creditors. The court decided in favor of the creditors, and ordered the sale of the plantation to satisfy their claims.

penses attending the suit, there remained in his hands the sum of ten thousand and twenty-three dollars and eighty cents. The claims against the insolvent amounted to forty-five thousand six hundred and forty dollars and eighty-one cents. The syndic ranked all the creditors on the tableau as ordinary creditors, leaving the questions of privilege in regard to the respective claims to be determined by the court.

Louis Planchard and others, who had been placed on the tableau as creditors for six thousand seven hundred dollars, opposing its homologation, prayed to be placed on it for ten thousand dollars, with privilege and preference over all others on the proceeds of the sale of a plantation surrendered by the insolvent, and upon which they had made and repaired a levee.

David C. Williams had been placed upon the tableau as a creditor for two thousand dollars. He prayed its amendment by allowing him a privilege over all others on the proceeds of the plantation for ten thousand dollars, the amount of a promissory note, for the payment of which, he alleged, the plantation had been mortgaged.

The minor heirs of Trouard, who were creditors upon the tableau for eight thousand one hundred and ten dollars, claimed to be placed thereon, with privilege for eight thousand three hundred and seventy-two dollars.

The judge *a quo* overruled the opposition of Planchard and others, decreed Williams to be placed on the tableau with privilege for one thousand seven hundred and seventy-nine dollars and fifty-six cents, and Trouard's heirs with privilege anterior to that of the vendor, for eight thousand and seventy-two dollars. Planchard and others appealed.

Soulé and Dennis, for Planchard, St. Avit, and others.

Daumoy, for Trouard's heirs.

Hennen and I. W. Smith, for Williams, made the following points:

1. D. C. Williams, is a creditor of George Weinprender, by judgment for ten thousand dollars, with interest thereon from April 3, 1816, till paid, with costs of court, as by record, number 2474 of the District Court, appears.

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2. This judgment was on a note of hand, given by Weinprender for the purchase of the plantation which was sold for ten thousand dollars, by the syndics, and D. C. Williams is privileged thereon, as holder of the note, by assignment from the vendor, Trouard.

3. The claims of all the other persons put on the tableau by the syndics, are contested by D. C. Williams, he requires strict and legal proof of their demands; this he contends they have not produced.

4. As regards the minors, Trouards, calling themselves the nephews of A. Trouard; no proof is given of the tutorship having been taken by A. Trouard, nor is there any proof of an inventory of their estate; no estate belonging to them ever existed in Louisiana. No tutorship existed in Louisiana; if any existed, the sale of the plantation was prior to such tutorship, and consequently, the tacit mortgage they claim, cannot go back to the land sold by their tutor prior to his appointment. And if any tutorship existed, it was in France, a foreign country; and the tacit mortgage cannot have effect in Louisiana, to the prejudice of creditors, citizens of Louisiana.

5. If any claim in favor of the Trouards exist, they have a tacit mortgage; it can have effect only on the plantation of A. Trouard, sold for ten thousand dollars; the balance of the property sold for six thousand one hundred and seventy dollars, is not liable in any way or event to their claims, as it was the private property of Weinprender, and was never held by A. Trouard.

6. The claims of the undertakers of the levee, must also be confined to the plantation sold by A. Trouard; as in their opposition, they expressly say, their work was done on that plantation.

7. The undertakers of the levee have no privilege on the plantation sold for ten thousand dollars, in as much as the

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levee they made thereon was washed away before it was ceded by Weinprender and sold by his syndics.

8. The contract for making the levee was never enregistered, and is not binding on third parties. *Louisiana Code, 3239. 1 Martin's Dig. 700, 704.* All liens are to be recorded, which have the effect of a legal mortgage. *Laws of 1817, p. 122, sec. 8.*

9. The makers of the levee have no privilege superior to that of the vendor. *Louisiana Code, art. 3235.*

10. The evidence adduced by the opposing creditors was illegal; and being taken subject to all legal exceptions, must be disregarded.

11. D. C. Williams is entitled to a dividend on the whole amount of his judgment, with the costs of court as a privileged claim.

12. D. C. Williams having a judgment is entitled to be paid by privilege before the chirographic creditors.

13. A division of the proceeds of the land purchased from A. Trouard by Weinprender must be made from the proceeds of the estate belonging to him in his private right, and a distribution be made of the two separate amounts among the respective creditors, holding mortgages and privileges thereon.

14. As there is no privilege or mortgage on the estate of Weinprender sold for six thousand one hundred and seventy dollars, the creditors must share *pro rata*, in the payment of any balance due them, after exhausting the proceeds of the plantation sold for ten thousand dollars.

15. The judgments, Nos. 595 and 868, offered in evidence by the opposing minors, Trouards, can have no effect against third persons, being *res inter alios acta*, and should be disregarded, being illegal evidence.

16. The judgments at all events can have no effect beyond their dates, and cannot make any private acts, documents or papers, on which they are founded, of any validity, before the date of the judgments.

17. The undertakers of the levee are not entitled to any dividend. The sole resource they had for their claim, the levee made by them, has been destroyed by the Mississippi.

18. No interest can be allowed to the creditors opposed, except where a judgment has allowed it, or their titles call for it.

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MATHEWS, J. delivered the opinion of the court.

The present case presents a contest between the creditors of the insolvent, involving claims of privilege and preference on the price or proceeds of a certain plantation sold by the syndic as the property of said insolvent.

The litigants now before the court are composed of three classes of creditors: First, the appellants, who claim a privilege as undertakers, who made and completed a levee on the land according to the adjudication of the police authorities of the parish where the plantation is situated. Second, the appellees who claim a tacit or legal mortgage on the premises in question as having been the property of their uncle, Achile Trouard, who acted as their tutor, and who on final settlement of his accounts, (as appears by two judgments rendered in the District Court,) was indebted to them, in his capacity of tutor, in the sum of eight thousand and seventy-two dollars. Third, certain persons who appear to hold the rights and claims of the vendor against the insolvent by regular transfer of the notes which were given by the latter to the former to secure the price of the plantation, &c.

The decree of the court below denies a right of privilege to the undertakers and makers of the levee; gives a preference in rank to the tacit mortgage claimed by the minors, Trouard; and accords to the creditors who have succeeded to the rights of the vendor, a concurrent privilege proportioned to the amounts transferred to each of them, &c.

From this decree the undertakers appealed, and by agreement, all the parties before this court are authorised to litigate, without restriction in relation to their respective claims.

Previous to the adoption of the *Louisiana Code*, no privilege seems to have been expressly granted by law on the land to persons who make and repair levees, to secure the payment for the value of such works. The privilege of un-

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The act of Feb.
22, 1817, con-
fers directly no
privilege on un-
dertakers for ma-
king and repair-
ing levees.

The 3216th arti-
cle of the *Civil*
Code gives no
preference for
making a levee to
the prejudice of
persons having
mortgages and
privileges on the
land previous to
the time when the
Code assumed
the force of law.

By the old *Code*
no privilege was
conferred upon
undertakers and
makers of levees.

undertakers of works of this kind, before that period, rested solely on the provisions of the old *Code*, relative to architects and other undertakers, and was limited to the houses, buildings, or works by them constructed, rebuilt or repaired. See old *Code*, p. 470, art. 75.

By an act of the legislature, approved February 22, 1817, a special privilege was granted to the parishes, on the land protected by a levee, on work done at the expense of the parish to secure the reimbursement of the amount expended for such purpose. See 2 *Martin's Dig.* p. 247. But this law does not appear to us to confer directly any privilege on undertakers of this sort of works; although it is possible that the parish might subrogate them to the right of privilege accorded to the former.

Being of opinion that the article 3216 of the *La. Code* cannot be allowed to operate so as to give a preference to the appellants, to the prejudice of persons having privileges or mortgages on the property previous to the time when the *Code* assumed the force of law, we are compelled to examine their claim of privilege in relation to the laws as they existed antecedently.

It might be considered as doubtful whether the privilege accorded by the old *Code*, could be extended beyond the levee itself, (which it appears in the present instance has long since been destroyed by the river,) although such a privilege would be futile in a great degree, as the levee without the land might be worth nothing; and from this consideration it may be fairly inferred, that the article of the *Code* did not provide, in any manner, a privilege in favor of undertakers and makers of works of this nature.

If, however, it should be granted, that under the operation of the old *Code*, the privilege claimed by the appellants extended over the whole tract of land secured by the levee made by their labor, still they cannot avail themselves of it against third persons; as the document on which it is founded is not shown to have been recorded in conformity with the provisions of an act of the legislature passed in 1813. See the *Acts* of that year, page 208.

It must be presumed that a process verbal of the adjudication of the work to them as the lowest bidders and undertakers, was reduced to writing, which might have been recorded as required by the act last cited. We, therefore, conclude that the court below was right in rejecting their claim of privilege.

On the part of the persons who claim the benefit of the vendor's privilege, (at least on the part of one of them, D. C. Williams,) strenuous opposition is made to the tacit mortgage, or lien claimed by the minors, Trouard. But the grounds on which this opposition is based, appear to us to be rather technical than substantial.

It is shown by the evidence that these claims against the tutor were settled by suits in the District Court, and the jurisdiction of that court is now denied. We are, however, of opinion, that the District Court was not without jurisdiction *ratione materie*; and as no advantage was claimed on account of personal privileges, the judgments there rendered are valid in themselves; perhaps liable to be impeached and annulled by third persons whose rights they may prejudice, on the ground of fraud and collusion; neither of which is pretended in the present instance. See the case of *Tabor vs. Johnson*, 3 N. S. 674.

The District Court is not without jurisdiction *ratione materie* in a suit brought by a minor to establish his claim against his tutor, and if no objection on account of personal privilege be taken at the trial, the judgment of that court is in itself valid.

Another objection is made to the claim of these minors on account of the want of legal appointment of the tutor. It appears that in relation to the inheritance which he undertook to manage for them, he acted without any regular authority. But this circumstance does not lessen or impair any of the responsibilities imposed by law on him or his property. By a provision of the old Code, to be found at page 456, article 20, a legal mortgage is imposed on the property of those who, without being tutors or curators, have taken on themselves the administration of the property of minors, &c. The same provision is renewed in the *Louisiana Code*. See article 3283.

There is no error in that part of the decree of the District Court, which sustains the privilege by the assignees of the vendor's claim for the price of the property.

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CURATOR, ETC.

The claim of D. C. Williams, for the whole amount of the judgment obtained by him against Weinprender was properly rejected; the note having been endorsed to them by Trouard to secure a less sum owing by the latter, his claim of privilege cannot equitably be extended beyond the amount to be secured, and in concurrence with the other transferees, which seems to have been decreed by the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A petitory action cannot be sustained unless the pleadings or evidence show the defendant in actual possession of the property claimed.

This was a petitory action to recover two lots of ground, situated in faubourg La Course, in the Parish of New-Orleans, alleged to be in the defendant's possession. He pleaded the general denial, and that he was not in possession of the lots. No evidence that he was in possession was adduced on the trial. Judgment was rendered for the defendant, from which the plaintiff appealed.

MARTIN, J. delivered the opinion of the court.

The plaintiffs having during the life of Smith, recovered from him an undivided half of certain lots of ground, by a final judgment which refuses to them the faculty of enforcing their claim to the other half, demanded by the present suit from his curator, the surrender of this remaining half.

The defendant pleaded the general issue, and especially denied his possession or detention of the premises, or any part of them with his knowledge, of their having belonged to Smith, except so far as appeared from the proceedings in the suit, referred to in the plaintiffs' petition, and an entry in Smith's books, stating he had parted with the possession of them to Fitz Williams, his vendor, averred that in consequence of this they had not been inventoried as part of his estate, the curator believing they did not belong thereto, and the estate was without any interest therein. Wherefore, he prayed to be dismissed with his costs. He, however, further prayed, that should it appear the estate had any interest in the premises, a reference might be had to the proceedings in the suit already mentioned, and the estate might have such relief and remedy as had been asked by Smith in his answer in the said suit.

The District Court gave judgment for the defendant, and the plaintiffs appealed.

Their counsel has contended in this court that the record of the suit against Smith, shows he was in possession; he has urged the lots are unimproved and vacant, that Smith's civil possession, with all his other rights vested in the defendant, in whom it must be presumed still to continue, and his prayer shows his intention not to abandon any right which the estate may have in the premises. That Smith's heirs are absent, and if no recovery can be had in the present suit, the plaintiffs are remediless.

It does not appear that the first judge erred. This is a petitory action which must be brought against the person "in the *actual possession* of the immoveable." *Code of Practice*, 43. The defendant denies his possession of any kind, and his knowledge of any right of Smith therein, at the time of his death, &c. It is true, that after praying to be dismissed, he goes further, and prays that should it appear that Smith's estate has any interest in the premises, which he does not pretend, it may have certain relief or remedy. He avers, that in his belief no such interest exists.

EASTERN DISTRICT
April, 1855

DELOOBY
ET AL,
VS.
DIXON,
CURATOR, ETC.

A petitory action cannot be sustained, unless the pleadings or evidence show the defendant in actual possession of the property claimed.

EASTERN DIST.
April, 1833.

SOULE
vs.
HEERMAN.

The plaintiffs, in our opinion, have mistaken their remedy, but it is not our province to point out the proper mode for the enforcement of their claim.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

Slidell, for appellants.

Schmidt, for appellee.

SOULE vs. HEERMAN.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The sale, by public auction, of a lot of land, described as a certain and limited body of a given extent, cannot be rescinded for a deficiency in measure of less than one twentieth of the whole lot.

Such a sale is complete by the adjudication, if the errors of the printed description are disclosed to the purchaser before his final bid.

This action was brought by the vendor of a lot of land, situated in the city of New-Orleans, sold at public auction, to compel a compliance by the vendee with the terms of the adjudication, or to recover the payment of the purchase money. The defendant admitted the purchase of the lot, but averred he bought under a description in the daily papers of the city, which was erroneous, and therefore he refused to comply with either of the plaintiff's demands.

Judgment was rendered in the court below against the defendant, from which he appealed.

L. C. Duncan, for appellant.

1. There is a material difference between the property sold, as advertised by the plaintiff, and that offered to defendant.

EASTERN DIST.
April, 1832.

SOULE
vs.
HARRIS.

2. The law is with the defendant. *Civil Code*, art. 2582 to 2586, inclusive. *Ibid.* 2470. 6 *Martin*, N. S. 337, &c. 8th *lb.* 658-9 and 60.

Defendant, *in propria persona*.

MATHEWS, J. delivered the opinion of the court.

This suit is brought to compel the defendant to comply with the conditions of a sale, by auction, of a certain lot of ground and the buildings thereon, situated, (as described in the plaintiff's petition) or to recover the price for which the property was adjudicated, &c.

The defence set up is, error as to the quantity of ground contained in the lot being less than was advertised for sale, &c. The defendant prayed for a trial by jury, and the cause was submitted to them, who found a verdict for the plaintiff, and judgment being thereon rendered; he, the defendant, appealed.

The advertisement under which the property was sold, describes it as "a lot of ground situated in Condé, between St. Philip and Ursuline streets, measuring twenty-eight feet front by one hundred and twenty in depth, French measure, with the buildings thereon, consisting in a brick house, divided into two apartments, kitchen, &c.; the lot, at a certain depth, where the house is built, opens two feet."

According to this advertisement, it is clear that the lot in question was not sold in relation to adjoining tenements, or from boundary to boundary. The sale was of a certain and limited body, as designated in the advertisement, in which its measure or extent is expressed. In a sale of this nature, a supplement of price, in the event of overplus of measure, cannot be claimed by the seller; neither can the purchaser

EASTERN DIS.
April, 1883.

BOULE
VS.
HEERMAN.

The sale by public auction, of a lot of land described as a certain and limited body of a given extent, cannot be rescinded for a deficiency in measure of less than one twentieth of the whole lot.

Such a sale is complete by the adjudication, if the errors of the printed description are disclosed to the purchaser before his final bid.

claim a diminution of price on account of deficiency in the measure, unless the real measure falls short by one twentieth part, regard being had to the totality of the object sold. *La. Code, art. 2470.*

The evidence in the present case shows, that the advertisement, in the first instance, contained an error of four inches in describing the number of feet front of the lot; but this seems to have been corrected, and that to the knowledge of the purchaser, before he bid for the property; and consequently this is a matter not to be taken into consideration in the decision of the cause. An attempt was also made in the court below, to show that he had knowledge, previous to his final bid, of the real situation of the lot in relation to its opening. But as it is proven that the deficiency of quantity does not amount to one twentieth part, having regard to the totality of the object sold, it is useless to investigate this part of the case; believing, as we do, that no grounds are established for a rescission of the sale. Had the deficiency amounted to more than one twentieth part of the whole object sold, the purchaser would, perhaps, have had no other remedy except a claim for diminution of the price; although, in a case of surplus, the buyer has the option to give the supplement or recede from the contract. *La. Code, art. 2472.*

It is true, that cases might occur, in which a deficiency of measure in a tract of land, or town lot of ground, of less than one twentieth, might produce a diminution of value in the thing, to a much larger amount than a twentieth part, *e. g.* when the tract of land is very extensive and only a small quantity of it rich and fit for cultivation; or when the deficiency interfered with some passage into the lot. The present case is, however, not shown to be similar to those supposed; and they would, probably, be referable to the first general rule on the subject of redhibition. *La. Code, 2496.*

It is seen that we have considered the sale, in the present instance, as complete by the adjudication, and so it is according to the article 2586 of the *La. Code.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

LICQUET'S HEIRS vs. PEIRCE.

EASTERN DISTRICT.
April, 1882.LICQUET'S
HEIRS
vs.
PEIRCE,

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The supplemental petition of the heirs or representatives of a deceased plaintiff, forms a revival of the action rather than an amendment to the pleadings, and before the defendant can be ruled to trial, he must be notified by service of the new petition and citation.

This was an action by the payee of a promissory note against the drawer, who admitted his signature and pleaded payment. The plaintiff afterwards died, and by a supplemental petition, Louise Duvernay, widow Bonaventure Martin, and her son Bonaventure Martin, prayed to be substituted in his place, as his legal representatives.

When the cause was called for trial, the defendant objected to proceed, until he should be served with a copy of the supplemental petition, and should file his answer thereto. The objection was overruled, because no new matter was added in the supplemental petition, and if the proper parties had not been made, advantage should have been taken by exception. The judgment was rendered for the plaintiffs, and the defendant appealed.

I. W. Smith and D. N. Hennen, for appellant.

1. There was error in the decision of the court below, overruling the defendant's objection, when the cause was called for trial, to proceed further until an answer should be filed to the supplemental petition, which alleged certain persons therein named, to be the plaintiff's legal representatives. 2 *La. Rep.* 391, *Allain vs. Preston*. *Idem.* 130, *Caldwell vs. Fales*.

2. The cause was tried without issue joined, because the supplemental petition alleged new matter, which was not merely formal, but material and important to the defendant; and without legal proof of its truth he might be required to

EASTERN DIS.
April, 1833.

LICQUET'S
HEIRS.
VS.
PEIRCE.

pay the same debt several times; and the unsupported averment of third persons, would be taken as conclusive evidence between the parties. *Code of Practice*, 421. *Also authorities above cited.*

3. There is error in the judgment, giving interest on an unliquidated account, from the day of judicial demand. *Code of Practice*, 554. 2 *La. Rep.* 577. *Trimball vs. Moore.*

Carter, for appellees.

1. The cause was properly tried, as the amendment permitted by the court was one of form, and required no answer. The substitution of heirs of deceased plaintiffs is authorised by article 113, *Code of Practice*. The cases cited by appellant's counsel, were decisions in reference to amendments changing the nature of the demand as stated in the original petition. This distinction of amendments into those of form and substance, is recognised in case of *Allain vs. Preston*, 2 *Miller*, p. 391. See *Code of Practice*, art. 419.

2. If the parties appearing as the heirs, were not so, defendant had a method to ascertain the same by means of exception, before the case was set for trial on its merits.

3. The use of the words, *legal representatives*, does not change the amendment from one of form to that of substance, as the order of court explains the terms, stating the substitution to be that of the heirs.

4. The account was a liquidated one, no objection was made below when the jury gave judgment therefor, and plaintiffs are entitled to interest.

The opinion of the court, PORTER, J. absent, was delivered by MATHEWS, J.

This cause is brought up on a bill of exceptions, found at page five of the record taken to the opinion of the judge *a quo*, by which the defendant was ruled to trial, &c.

It appears that the plaintiff in this action died after bringing suit, and after issue joined. This circumstance would have

caused an abatement, but by leave of the court, her heirs or representatives assumed her place, and were made parties by a supplemental petition.

EASTERN DISTRICT
April, 1838.

LICQUET'S
HEIRS
VS.
PRINCE.

This petition was not served on the defendant, nor does it appear that any express notice of it was ever given to him. Notwithstanding these omissions the new plaintiffs proceeded to trial and submitted their cause to a jury, and obtained a verdict and judgment. When heirs or representatives of a deceased suitor pursue an action already commenced by their ancestor by reviving the judicial process, it may be considered, rather in the nature of a new suit, than an amendment to the pleadings in that previously commenced. In this respect, the article 113, of the *Code of Practice*, cited by the counsel of the appellees in his points, is applicable to the present case, but in no other.

The article 419, relates solely to amendments which may be permitted after issue joined.

If the supplemental petition be viewed rather as a revival of the action, (and in this manner we think it must be viewed) than an amendment to the pleadings, the defendant before he could properly be ruled to trial, ought to have been notified of this revival, either by service of the new petition and citation, or by direct and positive notice to his counsel (if such would suffice) in order to answer and plead *de novo* in such manner as the case might require.

The supplemental petition of the heirs or representatives of a deceased plaintiff, forms a revival of the action rather than an amendment to the pleadings, and before the defendant can be ruled to trial, he must be notified by service of the new petition and citation.

We are, therefore, of opinion, that the judge below erred in forcing the defendant to trial, in the manner in which it was done.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled. And it is further ordered, that the cause be sent back to said court to be proceeded in *de novo*, according to law. The appellees to pay the costs of this appeal.

EASTERN DIS.
April, 1833.

RIERDON
vs.
THOMPSON.

RIERDON vs. THOMPSON.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

The testimony of a witness, reduced to writing on a former trial, cannot be read in evidence on a subsequent trial of the same case, unless the witness is out of the jurisdiction of the court, or some other equally forcible cause exists.

A cause will be remanded, if the verdict of the jury be contrary to an admission on record.

Rierdon claimed, with privilege, the sum of six hundred and forty dollars and seventy-six cents, of defendant, for carpenter's work on the house of the latter, in the parish of Iberville. Thompson pleaded the general denial; and a special contract, on which he admitted the plaintiff had performed work, and on which a balance remained in his favor of forty-nine dollars, which, it was alleged, had been tendered to him.

Judgment was rendered for the plaintiff for four hundred and eighty-two dollars and twenty-six cents. A new trial was granted to the defendant, and the second jury found for the defendant. Judgment having been rendered, and a new trial refused, the plaintiff appealed.

The opinion of the court, PORTER, J. absent, was delivered by MATHEWS, J.

This is an action on a *quantum meruit*, instituted by a carpenter to recover the value of certain labor done on a house of the defendant, at the instance and request of the latter. The value of the work, as estimated by the undertaker, amounts to six hundred and forty dollars and seventy-six cents; and this is established by the testimony of the cause, to be its value, according to the customary charges, by workmen.

The defendant pleaded the existence of a special contract, by which the undertaker agreed to do the work (for which he claims upwards of six hundred dollars,) for two hundred. He pleads, also, payment made on this amount, so as to reduce the balance owing on the contract, to forty-nine dollars.

EASTERN DISTRICT,
April, 1853.

RIERDON
vs.
THOMPSON.

The cause was submitted to a jury in the court below, who found a general verdict for the defendant, and judgment being thereon rendered, the plaintiff appealed.

It appears by the record, that the judgment from which the present appeal is taken, was rendered on a second trial. On the first trial, a synopsis of the testimony was made to serve as a statement of facts, in the event of an appeal; but in consequence of a new trial having been granted, no appeal was taken. The testimony thus abridged, was acknowledged to be correct, and signed by the counsel of the parties, who acted on the first trial. It was offered in evidence, by the plaintiff, at the second, and admitted, under a bill of exceptions taken by the defendant.

This evidence was excepted to, on the ground that the witnesses, or some of them, whose testimony it purports to contain, as taken down in writing on the first trial of the cause, were present in court, at the time of the second trial.

We think the judge *a quo* erred in admitting this evidence. It was not the best in the power of the plaintiff to produce. A re-examination of the witnesses before the jury would have been better. And as they seem to have been within the jurisdiction and control of the court, their testimony taken on the former trial, ought not to have been received, according to the rule of evidence, which requires the best to be adduced which the nature of the case admits.

The only principle on which these depositions could be legally admitted, would arise out of the impossibility to re-examine the witnesses in open court, on account of their absence from its jurisdiction, or some other cause of equal force.

The testimony of a witness, reduced to writing on a former trial, cannot be read in evidence, on a subsequent trial of the same case, unless the witness is out of the jurisdiction of the court, or some other equally forcible cause exists.

EASTERN DISTRICT
April, 1833.

TRACY ET AL.
vs.

STORER.

A cause will be remanded, if the verdict of the jury be contrary to an admission on record.

As to the merits of the case, it is clear that the verdict of the jury is contrary to the admissions of the defendant, and probably to the evidence.

The answer admits forty-nine dollars to be due to the plaintiff, even on the specific contract, as alleged; and there is no evidence of this sum having been legally tendered to him. And, moreover, we are inclined to believe that no such contract was ever made between the parties. But as this is a matter of fact, and most properly cognizable by a jury, the cause must be remanded.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be avoided, reversed and annulled, and the verdict of the jury set aside. And it is further ordered, that the cause be sent back to the court below, to be tried *de novo*. The appellee and defendant to pay the costs of this appeal, &c.

Burk and Davis, for appellant.

Nicholls, for appellee.

TRACY ET AL. vs. STORER.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where the plaintiff sues as the assignee of a bill of lading for eighty-eight packages of merchandise, and the assignment of the bill to him is not proved, if the jury find the delivery of eighty-six of the packages by the defendant to the plaintiff, to be a recognition by the former of the right of the latter to demand the whole, the Supreme Court will not disturb the verdict.

In May, 1831, a quantity of goods were shipped at Philadelphia, on board the ship *Chester*, of which the defendant

was master, to be delivered in New-Orleans to Nichol, Hill & Co., or to their assigns. The plaintiffs received all the goods shipped, conformably to the bill of lading, with the exception of two packages and a box, which, from the evidence, appear to have been mislaid, lost or stolen.

The defendant pleaded the general denial, and should it appear that he was indebted to the plaintiffs, he pleaded, in compensation, a specific sum for freight and primage of the merchandize received by the plaintiff.

The jury, without retiring, found a verdict for the plaintiffs, and judgment having been rendered thereon, the defendant appealed.

Carleton and Lockett, for appellants.

1. The evidence shows that the merchandize was delivered on the levee, and that the plaintiff had notice thereof; the judgment of the inferior court ought, therefore, to be reversed.

2. The defendant assigns for error apparent on the record, that there is no evidence that the bills of lading sued on, were ever assigned to the plaintiffs by the consignee; judgment, ought, therefore, to be given for the defendant.

Slidell, for appellees.

The opinion of the court, *PORTER, J.* absent, was delivered by *MARTIN, J.*

The plaintiffs claimed the value of two packages and a box of goods, shipped on board of the vessel, of which the defendant is master, according to a bill of lading, which they averred to have been assigned to them.

The defendant pleaded the general issue, and claimed a sum due him for freight. There was a verdict and judgment against him, and he appealed.

His counsel has urged in this court, that the goods were delivered on the levee, and the defendants had notice of it.

EASTERN DIS.
April, 1833.

MACALESTER
ET AL.

VS.
WILLIS ET AL.
BELL,
APPELLANT.

Where the plaintiff sues as the assignee of a bill of lading, for eighty-eight packages of merchandise, and the assignment of the bill to him is not proved if the jury find the delivery of eighty-six of the packages by the defendant to the plaintiff, to be a recognition by the former, of the right of the latter, to demand the whole, the Supreme Court will not disturb the verdict.

He further presented as an error in the face of the record, the absence of any evidence of the assignment of the bills of lading to the plaintiffs.

The first point was abandoned during the hearing, if it had not been, the fact having been proved by the jury, that there was no delivery, and the testimony not establishing any, we could not meddle with the verdict.

On the second point, the fact is, that the bill of lading stated eighty-eight different packages or boxes to have been shipped; the defendant delivered eighty-six of them to the plaintiffs; this, in our opinion, justified the jury in concluding, that the delivery of such a considerable portion of the merchandize to the plaintiffs, was a recognition of their rights to receive the whole in the bill of lading, which precluded him from contesting it. After the finding of the jury on this point, in their favor, the matter cannot have a different determination in this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

MACALESTER ET AL. vs. WILLIS ET AL.

BELL, APPELLANT.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

A claim, with privilege on the funds of defendant, in the garnishees hands, urged by the latter in his answers to interrogatories, and unsupported on the trial, will not be examined in the Supreme Court.

The plaintiffs claimed three thousand and seventy-two dollars and forty-eight cents, for merchandize sold and deli-

vered to the defendants, who resided out of the state, and cited Bell as garnishee. He answered, that he had in his possession, and belonging to the defendants, sixty-eight pieces of bagging and one hundred and twenty-three boxes tin, and an outstanding claim for two thousand seven hundred and forty-two dollars and ninety-nine cents; that the defendants were indebted to him *certainly* in the sum of three thousand one hundred and forty-three dollars and eighty-four cents; and *as he believed*, in the further sum of two thousand and sixty-three dollars and forty-four cents, and that he had a privilege over all others, in all the property of the defendants in his hands, for the payment of the amount due to him.

Judgment was rendered against the defendants for three thousand and sixteen dollars and eighty-one cents. The garnishee appealed.

The opinion of the court, PORTER, J. absent, was delivered by MATHEWS, J.

This suit was commenced by attachment, and Samuel C. Bell was summoned as garnishee, who, in answering interrogatories propounded to him, acknowledged property in his possession, and credits belonging to the defendants to a certain amount. The court below rendered judgment in favor of the plaintiffs against the defendants, for the sum claimed in the petition, and also condemned the garnishee to pay over to the former, the amount of funds of the latter appearing to be in his hands, and from this judgment, he appealed.

The cause is submitted to this court without argument and without any points filed on the part of the appellant.

We have examined the testimony on which the Parish Court seems to have founded its judgment, and are unable to perceive any error in relation to the amount adjudged to the plaintiffs. It is true the garnishee claimed in his answers to the interrogatories, privilege on the funds acknowledged to be in his possession, on account of advances of money made to

EASTERN DIS.
April, 1883.

MAGISTER
ET AL.
VS.
WILLIS ET AL.
BELL,
APPELLANT.

A claim, with privilege on the funds of defendant, in the garnishee's hands, urged by the latter in his answers to interrogatories, and submitted to the trial, will not be examined in the Supreme Court.

EASTERN DIST.
April, 1833.

CONAND ET AL.

VS.
COBBS.

the defendants; but this claim of privilege does not appear to have been supported on the trial of the cause.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the Parish Court be affirmed with costs.

Peirce, for appellants.

L. C. Duncan, for appellees.

CONAND ET AL. vs. COBBS.

APPEAL FROM THE COURT OF THE SECOND DISTRICT, THE JUDGE THERE
PRESIDING.

An order of appeal granted on the 14th of April, cannot, under any circumstances, be properly made returnable at the November term.

The facts are stated in the opinion of the court, delivered by MARTIN, J.

The plaintiffs appellees claim the dismissal of the appeal, on the ground of its having been made returnable at too late a day. It was granted on the 14th April, and made returnable at November term. One of the appellees resides in the parish of Ascension, where the judgment was rendered and the appeal prayed; the other in that of St. James. The Code of Practice requires the appellee to be cited at the next term, or at the subsequent, if a sufficient number of days do not intervene. Art. 583. The delay is of ten days, if the appellee reside within ten miles from the place where this court sets; if further, he is to have one day more for every ten miles; circumstances might have rendered the first Monday of May too early a day; but we are unable to say, that any could authorise the pretermission of June and July terms.

The appeal, is, therefore, dismissed with costs.

Nicholls, for appellants.

Deblieux, for appellee.

An order of appeal granted on the 14th of April, cannot, under any circumstances, be properly made returnable at the November term.

FLETCHER'S HEIRS vs. VIEIL ET ALS.

EASTERN DIST.
April, 1833.FLETCHER'S
HEIRS
vs.
VIEIL ET ALS.APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE THEREOF
PRESIDING.

A cause will be remanded if the plaintiffs claim property as forced heirs, and if not, then testamentary heirs, and the court below decided only upon their claim as forced heirs.

The petition represents the plaintiffs as the children and heirs of Santiago Fletcher, who died in Madrid, in 1801, leaving a plantation situated in the parish of Iberville, a part of which came to the possession of the defendant, and for that part, with its rents and profits, this action was brought.

The defendant pleaded a general denial, and title in himself, and cited the heirs of his vendor in warranty. Judgment having been rendered for the defendant, the plaintiffs appealed.

MARTIN, J. delivered the opinion of the court, PORTER, J. being absent.

The plaintiffs claimed, as the children and heirs of H. Fletcher, deceased, a tract of land, part of their ancestor's estate in the defendant's possession. He pleaded the general issue and title in himself, and called his vendee in warranty.

The plaintiffs were three in number; two of them (twins) were born before the marriage of their parents, the other since; the father had by will, instituted the mother and plaintiffs his heirs.

Two of them alleged they were legitimate, and the third that she was a legitimate daughter; and if not forced heirs claimed as testamentary ones.

The District Court was of opinion there was no doubt from the manner in which the marriage of the plaintiffs' parents had been celebrated, that the formalities required by law had not been attended to. Judgment was thereon given for the defendants, and the plaintiffs appealed.

EASTERN DIST.
April, 1833.

WILLIAMS
vs.
PALMER.

A cause will be remanded if the plaintiffs claim property as forced heirs, and if not, then testamentary heirs, and the court below decided only upon their claim as forced heirs.

The counsel for the appellants has urged, that the petition states the plaintiffs are children and heirs, and evidence of their birth, even unaided by the subsequent marriage of Fletcher, proves them to be his children, and his will in their favor establishes them to be his heirs.

We think with him the District Court erred; the judgment, if its conclusion was right, and the plaintiffs claimed as legitimate children and forced heirs only, ought to have been a judgment of non-suit at most; but as they claimed as heirs generally, and they have attempted to claim under a will, which the law authorised them to do; the father leaving no legitimate descendants, the District Court ought to have proceeded to examine their title under it.

The remanding of the case has not been opposed by the defendant's counsel.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the case remanded for a new trial.

Cuvillier, for appellants.

Hiriart, for appellees.

WILLIAMS vs. PALMER.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A letter in terms equivalent to a demand, addressed by the agent of the plaintiff, to that of the defendant, but intended for, and subsequently communicated to the defendant, puts him in *mord*.

The letters of one broker to another, through whom the parties entered into a contract, are admissible in evidence to explain the conduct of his employer.

The plaintiff averred he had sold the defendant one hundred and seventy-eight shares of the stock of the City Bank of New-Orleans, on each share of which had been paid twenty-five dollars, at four dollars and fifty cents advance, on the amount of each share paid, making in the whole, the sum of five thousand two hundred and fifty-one dollars. A conveyance of the stock was tendered to the defendant, who neglected to pay in the manner agreed, and after notice to the defendant, it was subsequently resold by plaintiff, at a rate less than that stipulated by the parties.

The defendant pleaded the general denial, and judgment having been rendered against him, he appealed.

MARTIN, J. delivered the opinion of the court.

The plaintiff having sold to the defendant a number of bank shares, and the latter declining to comply with the terms of the sale, and thereby to complete the transfer, the present suit was instituted to recover in damages the difference between the price at which the stock was sold, and that which it brought on a resale. The general issue was pleaded, the plaintiff had a verdict and judgment, and the defendant appealed after an unsuccessful attempt to obtain a new trial.

The facts of the case are as follows: Williams deposed, that on the 5th of May last, as the defendant's broker purchased by his order the stock from Smith, the plaintiff's broker, and received and delivered to his employer a power of attorney to authorise him to vote, as the owner of the stock, for directors.

The defendant was informed on the 27th, by a letter from Williams, that the stock should be transferred on the forenoon of that day, and he was requested to pay the price agreed on to the clerk of the transfers, who on receipt thereof would issue the requisite certificate. This request was repeated from day to day, the defendant having promised to do so.

On the 29th Smith wrote to Williams, that stock which by the terms of the contract was to have been transferred

EASTERN DISTRICT
April, 1882.

WILLIAMS
VS.
PALMER.

EASTERN DIS
April, 1893.

WILLIAMS
vs.
PALMER.

within twenty-five days, or sooner, had been transferred in blank, and was subject to his order. He complained that his verbal communications to that effect remained unattended to, and added, that unless this money was paid on the following day, the stock would be sold for the buyer's account. This note was communicated to the defendant on the 10th.

On the 2d of April, Williams was informed by Smith, that the stock had been resold, and that he and the defendant would be looked to for the deficiency. This was communicated by Williams to the defendant.

The testimony of Smith is to the same effect as that of Williams, as to the above facts. He added that he treated with Williams, knowing he acted merely as a broker, but without knowing for whom. He afterwards accidentally met the defendant who spoke to him about the bargain. The plaintiff handed to Smith a memorandum of the stock to be transferred on payment of the price, and Smith finding the defendant at the bank, showed him the memorandum, and gave him notice of the transfer, by drawing his attention to the transfer books. The defendant said all was right, but he could not then pay. After several applications to the defendant, and calls of Smith at the bank to see whether the transfer had been completed by the payment of the price, and the insertion of the defendant's name in the blank, the resale took place.

The defendant and appellant's counsel has relied on his bills of exceptions.

Two of them are to the judge's refusal to charge the jury.

1. That putting the defendant's broker *in morâ*, was insufficient to charge the principal, the court saying that in the circumstances of the case it was not.

2. That sufficient testimony had not been exhibited of the defendant being *in morâ*.

The last bill was to the admission in evidence of certain documents, being a part of the correspondence between the brokers.

I and II. It is necessary, in deciding on the two first bills, to take a view of the provisions of the *Louisiana Code*, as to the requisites to put the party *in morâ*.

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April, 1823.

WILLIAMS
VS.
PALMER.

The Code states three modes; by the terms of the contract, by the act of the creditor, and by the operation of the law, 1905. It is not pretended in this case, that the defendant was *in morâ*, by the terms of the contract or the operation of the law.

The party puts his adversary *in morâ*, when, at or after the time stipulated by the contract for the performance, he demands that it should be carried into effect, which demand may be made by the commencement of a suit, by a demand in writing, by a protest made before a notary public, or by a verbal requisition made in the presence of two witnesses. 1905, 2.

In this case it is not pretended that there was any suit commenced, any protest, or verbal requisition in the presence of two witnesses. A demand in writing must therefore be shown, unless it suffices, under a subsequent article of the Code, that the party who has to put his adversary *in morâ*, should perform the obligations imposed on him by the contract.

This article which is the 1907th is in the following words: "In commutative contracts, where the reciprocal obligations are to be performed, at the same time, or immediately one after the other, the party who wishes to put the other in default, must at the time and place expressed in, or implied by the agreement offer or perform, as the contract requires, that which on his part was to be performed, or *the opposite party will not be legally put in default.*"

If this article stood alone, the negative that the opposite party will not be legally put in default, might perhaps be correctly said to be pregnant with the affirmative, that on the mere performance of the previous requisite, the party is *legally* put in default. But a comparison of this article with the 1905th, does not admit the conclusion that the implication which may be drawn from it is sufficiently strong, (if any implication may be) to silence the *express* requisition in the

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other. The one must be received as a proviso, requiring in commutative contracts, no party should be said to have legally put his adversary *in morâ*, till he himself has performed the obligations incumbent on him.

The question now for our solution is, whether the defendant was put *in morâ* by Smith's letter to Williams, communicated to the defendant.

It is clear that this letter if it had been directed to the defendant himself, he would by the receipt of it be legally put *in morâ*, there is indeed no *express* demand of payment. But information is given that the plaintiff had, as far as he could, complied with his part of the obligation of the contract; complaint was made that his requisition is not attended to, and a threat made that if the payment be not made on a day named, the stock would be sold. This was clearly a demand in writing.

A letter in terms equivalent to a demand, addressed by the agent of the plaintiff, to that of the defendant, but intended for, and subsequently communicated to the defendant, puts him *in morâ*.

It is true the letter was addressed to Williams instead of being so to the defendant himself, but it was evidently from the whole testimony written for the eye of the defendant, delivered to his broker that it might reach it, and the evidence shows it was without delay communicated to the defendant.

On these facts we conclude that the judge correctly instructed the jury that the demand in writing, made in the letter of Smith to Williams, and by the latter communicated to the defendant, put him, the defendant *in morâ*.

On the second bill we assume that the *sufficiency* of the testimony alluded to, is its sufficiency to establish its legal consequence, if the facts deposed to, be believed. For as to the *sufficiency* of the testimony to create belief, the jury, not the court, are the legitimate judges.

In this point of view there cannot be a doubt that the judge did not err in instructing the jury, that if they believed the facts sworn, to be true, the defendant was legally put *in morâ*.

III. Neither do we believe he erred in admitting the letter of Smith to Williams to be read to the jury. These letters had both been communicated to him, and they are of use to explain his conduct after he had seen them; as what

is said even by a stranger in the presence of a party is allowed to be given in evidence, to explain his conduct, and even his silence. Besides Williams was his avowed agent, and he knew Smith to be the plaintiff's broker, and the communications all related to a contract which concerned them, and was entered into by his order.

WILLIAMS
vs.
PAULSEN.

The letters of one broker to another, through whom the parties entered into a contract, are admissible in evidence to explain the conduct of his employer.

On the merits the verdict of the jury is certainly correct, the defendant neglected or declined to comply with his contract, and he was properly charged in damages with the difference between the price he had purchased at, and that which was obtained on his failure, by a resale. His counsel has endeavored to urge, little credit is due to the witness who testified as to the resale, because after it took place the plaintiff offered to the defendant, the stock, if he would pay the price. This may have been with the consent of the purchaser, or may have been one of the conditions of the resale.

We have been referred to several decisions of ours, on the subject of the putting a party *in morâ*. They are 3 *Martin*, N. S. p. 564; *Bryon vs. Cox*; *Erwin vs. Forsyth*, 6 *id.* 229; *Llorente vs. Gairrie*, *id.* 623, and that of *Wallace et al. vs. Smith et al.*, lately decided, but the view we have taken of the present case has rendered every comment on them useless.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

Carleton and Lockett, for appellant.

Potts, for appellee.

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April, 1833]

BARON vs. KINGSLAND ET ALS.

BARON
vs.
KINGSLAND,
ET ALS.

APPLICATION FOR A MANDAMUS.

No appeal can be taken from a judgment of the court refusing an order to remove a cause to a court of the United States.

The jurisdiction of the Supreme Court is limited; the orders to the inferior courts authorised by the *Code of Practice* can only be issued in the exercise of its appellate powers, and the legislature can confer no authority beyond that required to give efficacy to those powers.

An application to remove this cause from the Parish Court for the city and parish of New-Orleans, to the Court of the United States for the Eastern District of Louisiana, was made by the defendants, alleging that they were citizens of the state of Pennsylvania, and that the plaintiff was a citizen of this state. The affidavit of one of the defendants to these facts, and the necessary bond were annexed to the petition for removal.

Judgment by default was entered on motion of the plaintiff's counsel, while the defendants' counsel was endeavoring to obtain a hearing of the court to grant their petition of removal, which the judge afterwards refused to grant. The court did not sit the preceding day, but no affidavit or bond was filed. The defendants applied to the Supreme Court for a *mandamus*.

The opinion of the court, PORTER, J. absent, was delivered by MATHEWS, J.

This cause is brought before the Supreme Court on a rule *nisi* obtained against the Parish Court of the parish and city of New-Orleans, to show cause why a *mandamus* should not issue ordering the inferior tribunal to remove, or suffer the case to be removed to a court of the United States.

Whether the reasons given by the court below justifying the refusal to permit the removal of the cause, would or would not be considered sufficient in a case legally cognisable by

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this court, we deem it useless to inquire, believing that the judgment of the Parish Court is not such as to authorise an appeal. Being interlocutory and not evidently tending to cause an irreparable injury to the applicants for the *mandamus*, no appeal from it could be regularly taken, and none such has been attempted to be taken.

The counsel seems to rely principally on the articles 831 and 858 of the *Code of Practice*, as giving authority, and consequently requiring the Supreme Court to exercise the jurisdiction which is asked by them in the present instance. The first of these articles is found in that part of the Code which treats of the writ of *mandamus*, which is defined to be "an order issued in the name of the state by a tribunal of competent jurisdiction," &c. This order may be issued at the discretion of the judge, even when the party has other means of relief, &c. (831.) The article 858 relates to the writ of *certiorari*, which may be granted "in a case where there was no appeal."

These writs or orders can be issued only by courts of competent jurisdiction. Now, according to the constitution of the state, the Supreme Court (although the name or appellation seems to indicate differently,) is a court of limited jurisdiction; its powers are appellate only. See article 4, section 2, of the Constitution. It is alone in the exercise of these powers that this court can issue the various orders to inferior tribunals as authorised by the *Code of Practice*. Being thus limited in its jurisdiction, it is believed that the legislature could not confer on the Supreme Court a general superintending and controlling power over the inferior courts, beyond what may be necessary to give efficacy to its jurisdiction, which extends only to appeals. The present application appears to us to be a claim on this court requiring the exercise of original jurisdiction, which cannot be done.

It is, therefore, ordered, that the rule taken in the Parish Court be discharged at the costs of the appellant.

Hoffman and Hill, for applicants.

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April, 1833.

BARON
VS.
KINGSLAND,
ET AL.

No appeal can be taken from a judgment of the court refusing an order to remove a cause to a court of the United States.

2 M 176

3 M 171

4 M 172

4 M 604

The jurisdiction of the Supreme Court is limited; the orders to the inferior courts authorised by the *Code of Practice* can only be issued in the exercise of its appellate powers, and the legislature can confer no authority beyond that required to give efficacy to those powers.

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April, 1833.

CHIAPELLA
ET UX.
VS.
MONI, ET ALS.

CHIAPELLA ET UX. vs. MONI ET ALS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A court has no authority to compel the correction of an error made in an act of celebration of marriage, recorded in the church register.

The plaintiffs alleged that the celebration of their marriage took place in New-Orleans, in one thousand eight hundred and three, conformably to the laws of the Province, and the rites of the Catholic church; and that the vicar of the parish Church of St. Louis of New-Orleans, who presided, and is now dead, having omitted at the time, to reduce to writing the act of celebration, he inscribed the act upon the register of marriages for one thousand eight hundred and thirteen, but stated no cause for the previous omission. The action was brought to have the register amended, by adding the cause of the omission.

The present curate of that church denied his power to amend the public records entrusted to his care, and the several persons interested, who had been made parties, denied the plaintiff's allegations, and the right to the amendment prayed. The court below refused to take cognisance of the cause, and the plaintiffs appealed.

The opinion of the court, MATHEWS, J. being absent, was delivered by PORTER, J.

This action is brought by the husband and wife, against the curate of the parish of New-Orleans, and keeper of the church register, to compel him to correct an error in the record made of the marriage of the petitioners. The persons who are alleged to have an eventual interest in the property which the husband may leave at his death, are also made parties, and called on to show cause why the correction of the error committed should not be made.

It is unnecessary to set out the pleadings, and it is sufficient to state, that they put at issue the legal right of the parties to obtain relief in the manner they have sought it.

EASTERN DIST.
April, 1832.CHIAPELLA
ET. UX.
VS.
MONI, ET ALI.

The allegations in the petition are, that the plaintiffs were married in the year one thousand eight hundred and three, and through the negligence of the then vicar of the parish of St. Louis of New-Orleans, or from some other cause, to the petitioners unknown, he omitted to reduce to writing the act of the celebration of the marriage, and that he afterwards, in the year one thousand eight hundred and thirteen, supposed he could correct the error by inscribing the fact of their marriage in the current register of that year, and leaving the record thus made to be signed by two of the witnesses present at the ceremony.

But that in making this inscription, although he inserted the true date of the marriage, he made no mention in the register, or elsewhere, of the omission alluded to, nor of the reasons why the record of the marriage was then made.

The petition affirms that the want of an explanation of this kind on the register, may work a great injury to the plaintiffs; that they have frequently requested the present curate to correct the error, but that he refuses to do so.

The court below considered itself without authority to make the change in the act, and having rendered judgment in conformity with that opinion, the plaintiffs appealed.

The laws of Louisiana do not provide for a case of this description. We have been referred to those of France; and we there find positive legislation on the subject. The Napoleon code contains a chapter on the *rectification des actes de l'état civil*, and under this legislation, it appears to be very common for courts of justice to order changes to be made in acts such as that before us. Our first code, as it is well known, was nearly a transcript of the Napoleon, and the omission to insert in it, the rules on this subject found in the latter, cannot be attributed to a failure to notice them, but to a different view being entertained of their utility.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Moreau and Soulé, for appellants.

Quemper, McCaleb, Farrar, and others, for appellees.

A court has no authority to compel the correction of an error made in an act of celebration of marriage recorded in the church register.

CASES IN THE SUPREME COURT

RIVIERE, J. W. C. vs. BOISSIERE.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A demand to rescind a sale, for lesion, must be supported by strong proof.

It is alleged that the defendant, taking advantage of the old age and infirmity of the plaintiff's ancestor, induced the latter, for three hundred and twenty-four dollars, to sell and give him possession of a lot, in New-Orleans, worth fifteen hundred dollars. The plaintiff prayed to have the property restored, or the balance of its value paid to her.

The defendant denied the allegations of the petition, averred the price which he paid was a fair one, and that he had become a *bona fide* owner of the lot. Judgment was rendered for the defendant, and the plaintiff appealed.

The opinion of the court, MATHEWS, J. being absent, was delivered by PORTER, J.

This is an action to set aside a sale of a town lot, on the ground of lesion. The case turns on the fact whether it existed or not. The judge of the court of the first instance, thought the evidence so doubtful, that he could not annul the contract; and he declared, that in cases of this kind, the evidence should be most clear and satisfactory in support of a plaintiff's pretensions. A perusal of the testimony, leaves our minds pretty much in the same situation with that of the judge of the first instance; and we fully agree with him in thinking that demands of this kind should be supported by strong proof.

A demand to rescind a sale, for lesion, must be supported by strong proof.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

D. Seghers, for appellant.

Canon, for appellee.

WATTS, CURATOR, &c. vs. FRAZER, ET UX.

EASTERN DIST.
April, 1853.WATTS,
CURATOR, &c.
vs.
FRAZER ET UX.

APPEAL FROM THE COURT OF PROBATES OF THE PARISH OF ASCENSION.

The 995th and 996th articles of the *Code of Practice*, distinguish between an estate accepted absolutely, and one which has come into the possession of the beneficiary heir, after having been administered by his tutor, curator, or the testamentary executor.

A tatrix cannot question the jurisdiction of the Court of Probates, for the purpose of annulling a judgment pronounced in that court on a claim admitted in her account rendered to that court, of her administration of an estate owned jointly by herself and her minor.

This suit was commenced by injunction. The plaintiffs denied the jurisdiction of the Court of Probates, which had rendered a judgment against them. They also alleged discovery, since the trial, of evidence of payment of the obligation on which the judgment had been pronounced; and prayed for a perpetual injunction on all further proceedings upon it.

The defendant pleaded a general denial, and moved to dissolve the injunction with costs and damages. The motion was granted, and judgment rendered in his favor. The plaintiffs appealed.

Nicholls, for appellants.

1. The Probate Court had no jurisdiction over the subject matter.—*Vide* 7 Mar. N. S. p. 41, *Cole's Widow vs. Cole's Executors*; 6 Mar. N. S. p. 519; *Saunders vs. Taylor*.

2. The court being incompetent, the judgment should be annulled.

3. The evidence of payment being lost and afterwards discovered, the court should have permitted the party to prove the same.

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April, 1833.

J. Seghers, for appellee.

WATTS,
CURATOR, &c.
vs.
FRAZER ET UX.

1. The judgment of the inferior court ought to be affirmed, on the grounds and authorities therein stated.

2. The claim is against a succession administered by a tutrix, and was, therefore, correctly brought before the Probate Court. The principle is well laid down in the case of *Roman vs. Ziringue*, that no suit can be instituted against a succession in the District Court, unless a settlement or partition among the heirs be previously made.

3. In the original petition, the tutrix is not stated to have become personally bound for the debt, as it is incorrectly alleged in the petition for an injunction. On the contrary, the original petition states that the debt is owing by the estate of the late William R. Boots; that the property of the deceased is liable for his debts, *which must be liquidated in the Court of Probates*, and ends, after mentioning the proceedings had in the estate of the said William R. Boots, by a prayer that Frazer and wife be decreed to pay out of the said estate, the sum claimed by Watts, the present appellee.

4. No evidence of payment was exhibited at the trial of the injunction. The debt, on the contrary, was proved by the introduction of the account rendered before the same Probate Court, on the 5th June, 1830, by Frazer and wife, of their administration of the said William R. Boots' estate. This account contains a full acknowledgment of the sum claimed by Watts, as curator of Job Key's succession.

The facts of the case are fully stated in the opinion of the court, MATHEWS, J. absent, delivered by MARTIN, J.

The defendants and appellants complain that the first judge erred in refusing to pronounce the nullity of a judgment which the present plaintiff had obtained against them, which was claimed on the ground that the court was without

jurisdiction, and on that of newly discovered evidence of the payment of the claim.

EASTERN DIS.
April, 1833.

WATTS,
CURATOR, &c.
VS.
FRAZER ET AL.

On the first point, the court held that a Court of Probates has jurisdiction of a claim against a succession administered by the tutrix of a person, and consequently beneficiary heirs, referring to the *Code of Practice*, 924, 612, and 913. 3 *Martin*, *N. S. Hood et al. vs. Shamburgh*, 622. It urged that the construction given by the Supreme Court, to articles 995 and 996, in the case of *Saunders vs. Taylor*, 6 *Martin*, *N. S.* 519, although it authorised ordinary tribunals to take cognisance of similar actions in certain cases, did not exclude the jurisdiction of the Court of Probates.

The counsel of the defendants has contended that it did, and he has relied on the case of *Cole's Widow vs. his Executors*, 7 *Martin*, *N. S.* 41.

The counsel of the plaintiff has relied on the case of *Roman vs. Ziringue*, lately determined in this court, and reported in 4 *La. Rep.* 202. He has shown, that in the suit on which the judgments ought to be annulled was obtained, nothing was claimed from the defendants (the present plaintiffs) personally; on the contrary, the debt was stated to be due by the estate of Boots, (Mrs. Frazer's first husband,) and time was prayed and given for payment, out of the property of the estate.

On the second point, he has contended that no evidence appears of the payment of the claim, but that on the contrary, its existence was rendered manifest, from the present plaintiff's recognition of it, in the amount they rendered of the then administration of Boots' estate.

By the *Code of Practice* 924 and 13, jurisdiction is given to Courts of Probates, of all claims for money which are brought against successions administered by curators, testamentary executors, or administrators of successions, and to establish the order of payment.

A like permission is repeated, as to the liquidation and payment of such debts, 983.

By article 992, the principles established for the discharge of debts due by curators of vacant estates, are extended to

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April, 1833.

WATTS,
CURATOR, &C.

VS.
FRAZER ET UX.

successions accepted, with benefit of inventory, whether the heirs are minor or of age, and to all successions administered by administrators. (See article 994, where tutors administering successions, are especially mentioned.)

It is true article 996 has a different provision in case of estates in the possession of heirs, either present or represented in the state, although all or some of these heirs be minors; for in such cases, the actions for debts due from such successions, shall be brought before the ordinary tribunals against such heirs themselves if they be of age, or against their curators, if they be under age or interdicted.

The case of *Roman vs. Ziringue*, fully supports the argument of the present plaintiffs.

That of *Cole's Widow vs. His Executors*, was brought for the recovery of her half of the proceeds of the common estate. We there held, that the Court of Probates having exclusive cognizance of the settlement of all debts against an estate administered by an executor, the action was properly brought in that court.

The 995th and 996th articles of the Code of Practice, distinguish between an estate accepted absolutely and one which has come into the possession of the beneficiary heir, after having been administered by his tutor, curator, or the testamentary executor.

The case of *Saunders vs. Taylor*, was that of a tutor administering the estate of his ward. The *Code of Practice* 995 and 996, seems to have made a distinction in the case of estates, which, after having been administered by a curator, testamentary executor, or a tutor of a beneficiary heir, have come to the possession of the heir, and those which are accepted absolutely. Unless there be some distinction of this kind, the Code presents an anomaly; for a minor who is necessarily a beneficiary heir, is immediately suable in the ordinary courts. A succession accepted with the benefit of inventory, and consequently, one which has descended to a minor, is administered not by the heir as tutor, but by him or another person, as an administrator, *Louisiana Code*, 1051; and as no part thereof comes legally to the possession of the heir as such, till the administration be legally terminated, the article of the *Code of Practice*; therefore, may be said to be confined to heirs absolute, or beneficiary ones who have obtained the balance of the estate from the administrator, after the termination of his office. The English text seems to exclude minors under

the age of puberty, for it speaks of *curators* only, not of tutors, and minors after the age of puberty, are the only ones who have the *administration*, and, consequently, the possession of their estates. Whatever be the rights of heirs of such kind to decline the jurisdiction of Courts of Probates, the present case is that of a tutrix, who has administered an estate, part of which belongs to her minor, part to her as in community with her deceased husband, who has acknowledged the claim of the creditor of the estate, in the account of her administration rendered to the Court of Probates. After having thus acknowledged her responsibility and its extent, she cannot complain of a judgment, by which she has been decreed to empty her hands.

No evidence of the alleged payment was administered.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

EASTERN DIS.
April, 1833.

LEWIS' HEIRS
vs.
HIS EXECUTOR
ET ALS.

A tutrix cannot question the jurisdiction of the Court of Probates, for the purpose of annulling a judgment pronounced in that court, on a claim admitted in her account rendered to that court, of her administration of an estate, owned jointly by herself and her minor.

LEWIS' HEIRS vs. HIS EXECUTOR ET ALS.

APPEAL FROM THE COURT OF PROBATES OF THE PARISH AND CITY OF
NEW-ORLEANS.

Heirship may be proved by reputation and other corroborating facts, if no register of births or marriages is kept in the state where it is alleged to have been formed.

While an order or judgment of the Court of Probates, directing the execution of a will, is unreversed, no other court can declare the will void, prevent its execution, or collaterally examine the correctness of the order or judgment.

A person can only attack directly, an authentic act alleged to have been made by him.

EASTERN DIS. If the formalities required by law have not been pursued, a testament is void,
May, 1833.

LEWIS' HEIRS
vs.
HIS EXECUTOR
ET ALs.

no matter how strong may be the moral evidence, that it contains the testator's last will.

It is sufficient, if the declaration required for the validity of a mystic testament, is made in words conveying the same idea as those used in the *Louisiana Code*.

The plaintiffs, residing in Virginia, sued as the brothers and heirs of the late Robert Lewis, who died in August, 1832, leaving an estate in New-Orleans. The defendants were his executor, the legatees, and the attorney representing the absent heirs. This action was brought to set aside the mystic will of the deceased; to compel the executor to render his account, and transfer to the plaintiffs all the effects of the succession in his hands. It was alleged that in making the testament, the deceased had not complied with the formalities required by law, and that it contained a *fidei commissum* and a substitution.

The executor denied that the plaintiffs were brothers and heirs of the deceased, averred the due execution and legality of the testament, and pleaded a want of proper parties.

Turberville, a witness, testified, that he recognised his signature upon the envelope. He first saw the will in the hands of the notary who delivered it folded, but whether sealed or not, witness did not know, to the deceased, telling him it was his will. The latter, who was then sick in bed, acknowledged it to be so, and signed it, but did not open it, nor had at that time any means of knowing its contents. Witness afterwards signed it, when the envelope was closed. He thinks something was written upon the envelope, and that the executor closed it with wafers in the presence of the witnesses.

Lassere, testified, that the envelope was signed by the deceased, saying, when told by the notary that it was his will, "yes it is my will," in the presence of all the witnesses, whose signatures are upon the envelope, of whom two or three had signed before the witness. He does not recollect

to have seen the other witnesses or the notary sign. Nothing was read to witness, nor did he read any thing before he signed.

Other witnesses corroborated the testimony in part of Turberville and Lassere.

The notary testified that he heard the will read to the deceased; saw him sign it; received it closed and sealed from him, stating that it contained his last will, written by another but signed by himself; wrote the superscription; read it to the deceased; and saw the envelope signed by the witnesses, who had all been present when the deceased signed.

The Court of Probates declared the will null and void, ordered the executor to render his account, to deliver to the register of wills the property, and pay into court the moneys in his hands belonging to the succession. The executor appealed.

Peirce, for appellant.

Schmidt, on the same side, made the following points:

1. Plaintiffs have not established that they are the legitimate brothers and heirs of R. Lewis, the testator. *La. Code*, arts. 89, 91, 103, 107, by which the question is to be decided, the laws of Virginia not being in evidence. *Taylor vs. Swett*, 3 *La. Reports*.

2. Courts of Probates are not by law authorised to annul a will; this power belongs to courts of ordinary jurisdiction. *Code of Practice*, arts. 921, 924, sec. 6.

3. Parol testimony inadmissible to prove that the acts declared by the notary to be done in the act of superscription were not performed. *La. Code*, arts. 2233, 2256; *Barry vs. Louisiana Insurance Company*. 11 *Martin*, 630; *Sirey*, vol. for 1826, 2 *partie*, 180; 5 *Toullier*, nos. 464, 501; 11 *Dalloz*, 32. The will being recorded and having the force and effect of record evidence, cannot be contradicted or falsified by parol proof. The petition contains no sufficient allegation under which such proof is admissible.

EASTERN DIS.
May, 1833.

LEWIS' HEIRS
vs.
HIS EXECUTOR,
ET ALA.

4. The will is sufficiently closed and sealed. The superscription and process verbal is conclusive proof on the subject. *Code of Practice*, art. 943. 5 *Toullier*, no. 501.

5. The law of France furnishes no rule for our government. Because it differs essentially from ours. *French Code*, arts. 976, 7, 8, 9. *Vide* 34 *Merlin's Rep.* p. 1; 15 *do. Quen. de Droits*, p. 420.

Because authors of reputation hold a contrary doctrine. *de Malville Cental*, *Old Code*, liv. vol. 2, p. 442, art. 976. 1 *Grenie*.

Because the latest decision shows the seal to be mere matter of form. *Heritiers Poulet vs. Marbin & Consart*, 11 *Dalloz*, 15.

Because, the reasons of the decisions in France not applicable here. 11 *Merlin's Repert.*, 40, 41, 42, 43. *Heritiers Proot*, 11 *Dalloz*, 14. Words must be taken in their ordinary acceptance, and as understood by the community generally. *La. Code*, art. 14; 6 *Toullier*, p. 294, no. 313. Even if such meaning be vicious. *Ibid*, no. 314. *Webster's Dictionary* shows, that fastening with wafers is sealing, and common usage not only in Louisiana but throughout the United States, sanctions that use of the word. *Griffith's Law Register*, pages 7, 35, 63, 96, 129, 200, 245, 226, 392, 414, 435, 455, 497, 570, 605, 659, 678, 753, 833, 907, 983, 1034, 1107, 1201. For the mutations which the doctrine of the common law has undergone, see note to page 1201, which shows that a wafer with a blank paper is a seal.

6. Sealing is equivalent to closing and sealing. 5 *Toullier*, p. 698, and *vice versa*. Closing is equivalent to sealing and closing. *Bonat vs. Bonat*, 11 *Dalloz*, 17. *Heritiers Ichon vs. Fontemoing*, *ibid*, 20.

7. The will was duly presented by testator. 1 *Grenier*, no. 264, p. 267; 5 *Toullier*, no. 472; 11 *Dalloz*, p. 21; *Nauthon vs. Pellet*, *ibid*, 23. The notary has declared that it was done; and the superscription shows with sufficient certainty that it was done in presence of all the witnesses.

8. The bequest to Nicholas Lewis does not contain a substitution. He takes only the usufruct permitted by *La. Code*,

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art. 1509, and which is not susceptible of substitution. 2 EASTERN DIS. May, 1822.
Proudhon, Traité d'Usufruit &c. p. 35 et seq. The children of N. Lewis take direct from the testator, and in the event of their inability the asylums supply their place, which is allowable. *Vide La. Code, art. 1504; Farrer vs. McCutcheon, 4 N. S. 45; and Tarbe vs. Arnaud, not applicable to a similar disposition.* In France the question has been decided. *Vide Colignon vs. Millereau, 30 Sirey; 2 Partié, 156; Ibid, Quetton St. George vs. Quet, 237.*

LEWIS' HEIRS
 VS.
 HIS EXECUTOR,
 ET AL'S.

Mazureau, for appellees.

Slidell, on the same side, made the following points:

1. The will is not closed and sealed, as required by article 1577 of the Code. To close is not to seal. A seal "is a stamp engraved with a particular impression, which is fixed upon the wax that closes letters, or affixed, as a testimony." See *Johnson's Dictionary*. A seal "is an impression upon wax, wafer, or some other tenacious substance capable of being impressed. See *Warren vs. Lynch, 5 Johns. Rep. p. 244*, and the authorities there quoted.

2. Article 1577, is not a new provision of the Code, it is to be found in the *Old Code, art. 99, p. 228*; and effect must be given to the French text. *Durnford vs. Clark's Estate, 3 La. Rep. p. 202.* "Scellé" means sealed with some impression of a stamp or seal, and the testament is null if there be no impression of a seal. 5 *Toullier, p. 451, no. 463; Paillet's Com. on article 976 of Code Napoleon; Dalloz's Jurisprudence de 19 siècle, vol. 11, p. 13; 1 Grenier, Traité des Donations, ps. 472. 479; 2 Delvincourt, p. 306; Merlin's Repertoire de Jurisprudence, verbo Testament, sec. 2, 3, art. 3, no. 4; Favard, verbo Testament, sec. 1, 4, no. 4.*

3. The superscription does not show that the formalities of the law have been observed; and any defect therein is fatal. See case of *Heritiers Baret, Court Cassation, reported 11 Dalloz, p. 26; Heritiers Lepiserti, 11 ibid. 27, 8; Heritiers Cox, 11 ibid. p. 30; 5 Toullier, p. 455, no. 471, 472; 33 Sirey,*

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May, 1833.

LEWIS' HEIRS
vs.
HIS EXECUTOR,
ET ALs.

Recueil General, verbo Testament, ser. 11, sec. 1, cert. 6, no. 10, p. 366. It does not declare that the paper was closed and sealed; it only declares that it was sealed. It does not declare that the presentation was made in the presence of the witnesses. These facts must result clearly from the terms of superscription, and cannot be supplied by proof or inference. See 34 *Merlin's Rep. p. 37. Verbo Testament, sec. 2, 3, art. 3, no. 13.*

All the formalities are *strictissime juris*, the want of any is fatal. *Civil Code, art. 1588; Bouthemy vs. Dreux et al. 12 Martin, 644; Knight vs. Smith, 3 Martin, 163; 1 Grenier Traité des Donations, p. 10, 11, 15, 31, 37.*

5. Parol proof may be admitted to contradict the enunciation of superscription. 3 *Martin, 62, Laylest vs. Schons; 12 ib. 641, Bouthemy vs. Dreux et al, 11 ibid. 630, Barry vs. La Insurance Company.*

6. Subscribing witnesses are competent to disprove facts averred in act of superscription. There are no grounds of incompetency but those expressly stated in the *Code, art. 2260.* The provisions of the Spanish law on the subject of notaries, are repealed by act of March 25, 1818, section 25. See 1 *Phillips' Evidence, ps. 31, 33. 9 Toullier, ps. 492, 495. nos. 312, 313.*

7. The residuary bequest to Nicholas Lewis, is a substitution and void. *Civil Code, arts. 1509, 1469; Farrer vs. M^cCutcheon, 4 N. S. 45; 5 Toullier, ps. 16 to 41; 8 Pandectes Françaises, p. 245; 7 Sirey, p. 1211, 1212.*

8. The Court of Probates alone could entertain a suit for the nullity of the will. *Harty vs. Harty, 8 N. S. 518; M^cConner vs. Dunbar, 1 La. Rep. 19.*

The opinion of the court, MATHEWS, J. absent, was delivered by PORTER, J.

This is an action instituted by the heirs of the deceased Robert Lewis, to annul and set aside an instrument which had been probated as his last will and testament; or in case the will should not be declared void *in toto*, to have certain bequests therein contained, annulled.

The petition sets out that the will which the plaintiffs seek to annul, purports to be the mystic will of the said Robert Lewis, written by another person, and for the validity of such wills, the law expressly requires that the same, or the paper serving as their envelope, be *closed and sealed*. Second, that the testator shall present the same thus closed and sealed to the notary, and to seven witnesses, or cause it to be closed and sealed in their presence. Third, that he shall declare to the notary in presence of the witnesses, that the paper contains his testament written by himself, or by another by his direction, and signed by him, the testator. Which your petitioners aver, and are ready to prove was not done, and which does not, as it ought to appear to have been done, from the act of superscription of said will.

The answer puts at issue the heirship of the plaintiffs, asserts the validity of the will, and avers the legality of the several legacies contained in it.

There is also an answer by one of the legatees, a prayer of intervention on the part of one Sarah Lewis, and an answer on the part of the attorney appointed to represent the absent heirs, which we do not consider necessary to set out.

Before we enter on the principal questions in the cause there are two or three points of considerable importance, but of easy solution, which may be disposed of.

The first in order of these, is an objection to the sufficiency of the evidence to establish that the plaintiffs are the heirs of the deceased. It appears from the testimony adduced, that they were born in Virginia, and that in that state no official register of marriages is kept, nor any of births. We think, under these circumstances, that the relationship may be proved by reputation, and by other facts tending to establish the connexion. The evidence on that head satisfies us in the present case, that the plaintiffs are the heirs of the deceased.

The second is, that the Court of Probates had not jurisdiction in this case, and could not entertain a suit to annul a will. We think on the contrary it had jurisdiction, and

EASTERN DIST.
May, 1832.

LEWIS' HEIRS
vs.
HIS EXECUTOR
ET AL.

Plaintiffs in error
vs.
Defendants in error

Heirship may be proved by reputation and other corroborating facts if no official register of births or marriages is kept in the state where it is alleged to have been formed.

While an order or judgment of the Court of Probates directing execution of a will is unrevoked

EASTERN DIST.
May, 1853.

LEWIS' HEIRS
VS.

HIS EXECUTOR
ET ALs.

no other court
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 will void, prevent
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we do not see that any other court had already received the will and ordered its execution. While that judgment or order stood unreversed, no other court could declare the will void, and say it should not be executed. The suit was therefore properly brought, no other tribunal could collaterally examine into the correctness of the proceeding by which the will was probated.

The third objection is, that the allegations in the petition did not authorise the introduction of parol evidence to attack the verity of the instrument, even admitting that species of proof to be admissible, under proper averments.

We have already, in order to show the strength of this objection, set out verbatim, the allegations in the petition. It appears to us they did authorise the proof. The plaintiffs say they will prove, that those things which are necessary to give validity to the will, were not done; it is true, they add, that these things do not appear to have been done, as they should appear, by the superscription; but, under these allegations, the fair and just construction appears to us, that they would prove by evidence *aliunde*, as well as by the instrument itself, that the formalities of law had not been complied with.

But another, and more serious objection, is made to the introduction of parol evidence. The act of the notary receiving the will in the presence of witnesses, is an authentic act: and it makes full proof of what is contained in it. To authorise you to disprove its verity, you should have made an *inscription de faux*, as is the practice in France. Such is certainly the course of proceeding in that country, and it appears there are two inscriptions of this kind. *Faux principal*, which we understand to be equivalent to a prosecution here on behalf of the state against the authors of the crime. The other is called the *faux incidentale*, to which we have nothing similar in our practice, and which we do not think it very desirable we ever should. By this proceeding, whenever an act is presented by one of the parties, in the course of a trial, which purports to be authentic, and the other alleges it is not so, the civil suit is suspended until a trial can be had

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on the *inscription de faux*, which partakes of the character of a criminal prosecution. This, in France, it is proper to remark, is the consequence of positive legislation. Here our legislature have furnished us with no provisions on the subject, which implies very strongly they did not intend the remedy should be used. Our practice in Louisiana, it appears to us, is more simple and direct, and attains the ends of justice just as efficiently. We do not wait for a judgment in the criminal prosecution, because it could not be evidence against those whose civil rights were affected by the instrument. Instead of the *faux incidentale*, we permit the party attacking the instrument, to introduce the proof in the civil suit; all we require of him is, that if the act emanates from him, or is alleged to emanate from him, he shall attack it directly, and put his opponent on his guard. 6 N. S. 512. We see no reason to change our practice; positive law does not require us to do so—convenience does not. Under our code, we think there is the same authority to bring a suit to set aside an instrument which stands in the way, and obstructs the enjoyment of a right to property, as there is to sue directly for that property itself. And if the suit can be brought, the proof may be admitted, unless we come to the conclusion that what notaries do, is binding on the whole world, which is not pretended, and could not be maintained.

We now come to the merits of the case. The Louisiana Code requires, for the validity of the mystic, or secret testament, that,

“The testator must sign his dispositions, whether he has written them himself, or caused them to be written by an other person.

“The paper containing these dispositions, or the paper serving as their envelope, must be closed and sealed.

“The testator shall present it, thus closed and sealed, to the notary and to seven witnesses, or he shall cause it to be closed and sealed in their presence. Then he shall declare to the notary, in the presence of the witnesses, that the paper contains his testament, written by himself, or by another, by his direction, and signed by him the testator.”

EASTERN DIS.
May, 1833.

LEWIS' HEIRS
VS.
HIS EXECUTOR
ET ALs.

A person can only attack, directly, an authentic act alleged to have been made by him.

EASTERN DEK.
May, 1893.

LEWIS' HEIRS
vs.

HIS EXECUTOR
ET ALs.

If the formalities required by law, have not been pursued, a testament is void, no matter how strong may be the moral evidence that it contains the testator's last will.

The object of these ceremonies, is to prevent impositions being practised on men in their last moments. And the law, in its anxiety to guard against the testator being circumvented, or practised on, will not permit a testament to have any effect, no matter how strong the moral evidence may be that it contains truly his last dispositions of his property. The formalities, (our Code says) must be observed, otherwise the testaments are null and void. Courts of justice, therefore, can do nothing else but inquire, when a case of this kind arises, whether the formalities have been pursued.

In the case before us, the evidence satisfies us, that the testator did not declare, in the presence of the witnesses, whether the will had been written by himself, or by an other under his dictation, and signed by him. This declaration is required to guard, as much as possible, against the substituting, thereafter, another will in place of that which the testator presents, and in furtherance of the object which the law has so much at heart, is not without its utility. But whether of utility or not, it is a formality in the making of a will; it is a formality which has not been pursued, and for want of which the law has declared the testament shall be null and void.

It has been contended that the words used in the law are not indispensably necessary to be followed by the testator, and that other language, which conveys the same idea, is sufficient. This is true, and there are several cases decided in the French courts on that principle. Whenever it can be fairly inferred from what was done, that the law has been complied with, it is sufficient. Here we cannot indulge in such a presumption, for the proof repels it.

It is sufficient, if the declaration required for the validity of a mystic testament is made in words conveying the same idea, as those used in the Louisiana Code.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court be affirmed, with costs.

DESLOMONDES vs. WILSON ET ALS.

EASTERN DISTRICT
May, 1868.

DESLOMONDES

vs.

WILSON ET ALS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The public offer of a reward for the recovery of lost property, creates an obligation on the part of the loser, which may be enforced by the person, through whose means the property is restored.

A part of the reward only is due to the finder of a part of certain articles, for the recovery of all of which, the reward has been offered.

The facts of the case are fully stated in the opinion of the court, PORTER, J. absent, delivered by MARTIN, J.

The petition states a negro slave broke open a press in the plaintiff's house, and stole therefrom, a sum of about three thousand dollars, with a number of valuable papers; that he was arrested on board of a boat, and jumped into the river, and was drowned, and afterwards, his body being picked up, a packet, containing two thousand five hundred and eighty-two dollars, in bank paper, was taken out of his jacket pocket, and deposited in the Bank of Louisiana, by the defendant, Wilson, to be delivered to one of the other defendants, mayor of the city of New-Orleans, on a check which the first named defendant gave him. The present suit was brought against them and the cashier of the Bank of Louisiana, for the purpose of obtaining the said packet.

The mayor deposited in court the check, which the defendant, Wilson, had given him, and denied any agency in the matter.

The cashier admitted the special deposit of the packet by the defendant, Wilson, in bank, denied having ever refused, and averred his willingness to deliver the packet, on the presentation of the check.

The defendant, Wilson, admitted his taking the money from the body of the drowned slave; denied the plaintiff having ever exhibited any proof of the money being hers, and

EASTERN DIS.
May, 1833.

DESJONDES
VS.
WILSON ET AL.

averred she was not the owner thereof, and concluded, that if she established her property therein, he was entitled thereout to a sum of five hundred dollars, which by an advertisement in the newspapers, she had offered for the recovery of the money.

The District Court allowed to the defendant, Wilson, five hundred dollars, and decreed the rest to be delivered to the plaintiff, but condemned the former to pay costs.

The plaintiff appealed, and the defendant has prayed the amendment of the judgment, so far as to relieve him from the payment of costs, and to allow that to him.

The appellee's restricted prayer for the amendment of the judgment, her relieved as from the trouble of any inquiry as to the plaintiff's ownership.

We are, however, to examine her objection to the allowance made to the defendant.

His agency appears to have been confined to the taking out of the pocket from the corpse, and its safe deposit in bank. This does not present a claim of salvage. His claim is, therefore, as a *negotiorum gestor* or on the advertisement. In the former capacity, he could not claim a great deal; but it is just, that where a party endeavors to excite attention and industry, for the recovery of his property, he should not be permitted to disappoint the just expectations which he has induced, or those by whose means he may regain his property.

The public offer of a reward for the recovery of lost property, creates an obligation on the part of the loser, which may be enforced by the person thro' whose means the property is restored.

The evidence in this case, does not, however, fully support the allegation in the answer, that five hundred dollars were offered for the recovery of the money.

The advertisement announces, that besides a sum of about three thousand dollars, sundry very valuable papers, promissory notes, &c., to the amount of about fifteen thousand dollars, and a reward of five hundred dollars is offered for the recovery of the described lost property.

We have not been favored by an argument from the plaintiff's counsel; that of the appellee has urged that the advertisement states that the payment of the notes has been stopped, from which he infers, that the loss of them is not very important.

The district judge has allowed the reward of appellee for the recovery of the whole property, although but a part of it has been recovered. There was property in promissory notes to the amount of fifteen thousand dollars, and in bank notes and specie, about three thousand dollars, in all, eighteen thousand dollars; the sum recovered, two thousand five hundred and eighty dollars, *i. e.* about one-seventh part. It is true, the promissory notes being only the evidence of the debt they represent, the loss of them does not necessarily bring with it, the loss of the money due, if the notes were not endorsed in blank; that the absence of them must create trouble and vexation, and will probably evade the obligation of giving security, we must presume that it was partly with the intention of averting all this that a reward of five hundred dollars was offered. It appears to us, therefore, improper, that the plaintiff should pay the whole reward, while but a part of the contemplated advantage is obtained, and we think complete justice will be done to the appellee, if he be allowed one half of the reward offered, but we are unable to see on what ground he was charged with costs.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed, and that the sum of two hundred and fifty dollars be paid out of the money in bank, to the appellee, Wilson, and the balance paid to the plaintiff and appellant, she paying costs in both courts.

Canon, for appellant.

Preston, for appellee.

EASTERN DIST.
May, 1833.

DESLOTTES
vs.
WILSON ET AL.

A part of the reward only is due to the finder of a part of certain articles, for the recovery of all of which, the reward has been offered.

EASTERN DIS.
May, 1833.

**DENIS,
SYNDIC, &C.
vs.
OGER ET AL.**

DENIS, SYNDIC, &C. vs. OGER ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If a defendant, interrogated as to his receiving certain notes from an insolvent as collateral security, answer that they were not transferred to him as collateral security, the strong presumption of verity attached to his answer, is not destroyed by the near proximity of the amount of the notes, to the debt of the insolvent to the defendant, as sworn to at the meeting of his creditors.

On the 28th February, 1831, Benoit and Blanchard filed their bilan, and made a cession of their property. In the month of October following, this suit was instituted by their syndic, to recover of the defendants five promissory notes in their possession, drawn by Honoré Gainet, on the 9th October, 1830, and payable on the ninth of March, 1832, amounting in the whole, to the sum of five thousand five hundred and ninety-eight dollars and seven cents.

The defendants pleaded the general denial, and that they were the true owners of the notes.

The plaintiff had judgment, and the defendants appealed.

PORTER, J. delivered the opinion of the court.

The petitioner sues the defendants to obtain possession of five notes of hands executed by one Gainet, in favor of the insolvents.

The answer puts at issue the right asserted in the petition.

The plaintiffs resorted to the conscience of his adversaries for the proof necessary to enable him to sustain his case, and propounded to them the following interrogatories:

1. How did you come in possession of the above described notes and when?

2. Were not the above described notes given to you as collateral security for sums due you by the said Benoit and Blanchard?

To the first interrogatory, it was answered "that the notes mentioned in the petition, were given by Benoit and Blan-

EASTERN DIS.
May, 1872.

DEWIS,
SYNDIC, & C.
ES.
OGER ET AL.

The following is a list of the names of the persons who were present at the meeting of the Board of Directors of the American Telephone and Telegraph Company, held on the 15th day of May, 1906, at New York City, New York:

... ..

EASTERN DIS.
May, 1833.

**DENIS,
 SYDIE, &c.
 vs.
 OGER ET AL.**

If a defendant interrogated as to his receiving certain notes from an insolvent as collateral security, answer that they were not transferred to him as collateral security, the strong presumption of verity attached to his answer, is not destroyed by the near proximity of the amount of the notes, and the debt of the insolvent to the defendant, as sworn to at the meeting of his creditors.

sary, as the falsity of the reply to the questions propounded, is evident by an oath taken at the meeting of the creditors of the insolvents, by the defendants. It is shown they there swore, they were creditors of the estate for the sum of nine thousand two hundred and ninety-five dollars and ninety-five cents, and that it appears the amount of notes of the bankrupts held by them at the period, the obligations now sued for, were remitted to be discounted, was nine thousand, one hundred and twenty-eight dollars and twenty-five cents. The close approximation of these sums, it is urged, shows that the notes now sued for, were not received in payment, for if they had, the balance due to the defendants, would not amount to four thousand dollars. This argument would be entitled to some weight, if it were shown that at the time the insolvents passed the notes to the defendants as their property, nothing more was due to them than the amount evidenced by the obligations of the former, or that they did not become indebted to them since. But no evidence of that kind is produced; we are left to infer it from the near approach which the amount sworn to and that evidenced by the notes, make to each other. This is surely not enough to destroy the strong presumption of verity which the law attaches to the answer to interrogatories, and certainly does not authorise this court to believe and say, the defendants committed perjury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided, and reversed; and it is further ordered, that there be judgment for the defendants as in case of non-suit, with costs in both courts.

Soulé, for appellants.

Appellee, in propria persona.

McDONALD, SURVIVING PARTNER, &c. vs. MILLAUDON.

**EASTERN DISTRICT,
May, 1833.**

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

**McDONALD,
SURVIVING
PARTNER, ETC.
vs.
MILLAUDON.**

Where the plaintiff claims by a contract, the general issue puts him on the proof of it, but where he sues in a representative capacity created by the law, it does not.

Previously to the late amendments to the Code, partnership might be implied as to third persons.

The terms "laws and usages of commerce" in the *Civil Code*, were intended to refer to the laws and usages of the other states, unless those laws and usages conflicted with the positive legislation of Spain or were in opposition local usages prevailing in this state.

If merchandise is sold by the consignee, his responsibility is the same whether it has or has not come into his possession.

In 1822, the late firm of McDonald & Ridgely, trading in the city of Baltimore, of which the plaintiff sues as the surviving partner, consigned a quantity of merchandise to the late firm of W. & D. Flower, of the city of New-Orleans. It is alleged that in this firm the defendant was a dormant partner. A great portion of the goods were sold, and an account of the sales was furnished to the consignors, by which it appeared there was due them the sum of one thousand two hundred and twenty-six dollars and six cents. To recover this sum, with interest, this action was brought.

The defendant denied generally the allegations of the petition, and especially his alleged partnership with W. & D. Flower. He pleaded prescription.

The judge *a quo* decided that the contract between W. & D. Flower and defendant, was not one of partnership, but of a sale of a certain part of the profits, which is permitted by the *La. Code*, art. 2786. Judgment having been rendered for the defendant, the plaintiff appealed.

Worthington, for appellant, maintained that:

1. The defendant became a partner in the house of W & D. Flower, and liable as such to creditors of the said firm in

EASTERN DIS.
May, 1833.

M'DONALD;
SURVIVING
PARTNER, ETC.
VS.
MILLAUDON.

consequence of an implied agreement to receive one-third of the profits of said concern, which we prove he afterwards received. *Gow*, 15, 22; 1 *Montagu on Partnership*, 2, 11; 2 *William Blackstone's Rep.* 998; 1 *Henry Blackstone*, 37; 2 *ibid.* 243; 15 *Johns. Rep.* 422; 6 *Sergeant & Rawle*, 259; 3 *N. S.* 39; 6 *ibid.* 49; 5 *Peters' Rep.*; 3 *Har. & Johns.* 505.

2. The agreement constituted no sale of profits. See definition of sale in *Pothier* and in the Code. The article 2780 does not apply; the partnership having been formed in 1823.

Grymes, for appellee.

The opinion of the court, *MATHEWS*, J. absent, was delivered by *PORTER*, J.

The defendant is sued as a dormant partner in the firm of *W. & D. Flower*. It is alleged that he received a share in the profits of the partnership, and that in consequence thereof he is responsible for its debts. The petition states, that in the year 1822, the firm of *McDonald & Ridgley* consigned merchandise to the house of *W. & D. Flower*, to be sold on their account; that sales were made of these goods, and that the sum of twelve hundred and twenty-six dollars and six cents is due to the petitioner.

The answer denies the allegations in the petition, and avers, that the defendant is in no manner liable to the plaintiff; it also contains the plea of prescription.

The judge of the first instance decided, that the defendant was not a partner as alleged in the petition, and gave judgment against the plaintiff. From that judgment, this appeal is taken.

A question has been raised on the argument here, which as far as we can gather from the proceedings, was not made in the court below. It is contended that the general issue presented by the answer, puts the plaintiff on the proof of his right to sue as surviving partner, and that having failed to give that proof, he should be non-suited.

The uniform course of decision in this court has been, to require a special plea, when the plaintiff's right to sue in a representative capacity is contested. When our attention was first called to the objection made in this case, we thought it of more weight than on further reflection we consider it entitled to. We are unable to distinguish between the representative character of the heir, executor or curator, and that of the surviving partner who claims the right to collect the debts and settle the affairs of the partnership. They are all legal assignees; that is, they are authorised to collect the debt in which the deceased had an interest by virtue of a power conferred by law, or a right cast on them by the death of the party in whom the legal title was vested. The true distinction in relation to this matter we take to be, that where the plaintiff claims through a contract, the general issue puts him on the proof of it; where he sues in a representative capacity created by the law, it does not.

EASTERN DISTRICT
May, 1833.

M'DONALD
SURVIVING
PARTNER, ETU
[et al.]
MILLAUDON

Where the plaintiff claims by a contract, the general issue puts him on the proof of it, but where he sues in a representative capacity created by the law, it does not.

The agreement from which the defendant is charged to be responsible for the debts of W. & D. Flower, was reduced to writing, and has been produced in evidence. The first part of it relates to the manner and time the defendant was to advance to the firm the sum of twenty thousand dollars. The clause of the contract, which it is material in the decision of this cause, is in the following words: "And the said W. & D. Flower, on their part, engage and bind themselves to pay to the said Laurent Millaudon, an interest at the rate of ten per centum per annum, on any or all sums of money so received by them of the said Millaudon, from the period from which they shall have received the same, until they shall refund and repay it to him. Which time of reimbursement will not exceed the first day of July, 1825; the interest to be settled and paid up yearly, on the first day of July of each year, to Laurent Millaudon, until the three years have expired; and in consideration of the sum so furnished, or to be furnished by the said Laurent Millaudon to the said W. & D. Flower, viz: by his endorsements of their notes of accommodation as aforesaid, and by the advances of money as before mentioned, the whole amounting to twenty

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thousand dollars, the said W. & D. Flower will give to Laurent Millaudon their obligation secured by Henry Flower, James Flower, Joseph L. Finlay and J. C. Faulkner, and also one-third part of the profits of the new establishment, under the firm of W. & D. Flower, which is to take place on the first day of July next, and continue until the first of July, 1825, of which copies are to be furnished each of the parties." This agreement is signed by Millaudon and W. & D. Flower.

The commercial law of the United States, or rather of our sister states, would hold the defendant liable for the debts of the partnership on a contract such as this. The dormant partner is made responsible to the creditors of the firm as soon as he is discovered, whether they had a knowledge or not that he was a member of it when they contracted, and a right given to partake in the profits constitutes him a partner. It is held that such a right in itself is inconsistent with any other character; that the profits of the business create a fund which all who contract with the partnership have a right to look to for payment; and that it is a fraud on those who deal with it, for any to abstract that fund, and at the same time escape from responsibility from those contracts by which that fund was created.

Whether such be the rule of our law, is the main question in the cause.

But before examining that question, another point raised by the defendant must be disposed of. He contends that the agreement by which W. & D. Flower promised to let Millaudon have a share of the profits, was nothing more than a contract of sale or exchange. He refers to the terms of the agreement in which it is said that in consideration of the money to be advanced by him, the endorsements to be furnished, &c. they were to give their notes jointly with other persons, and the one-third of the profits of the establishment. Whether these stipulations, if there were no other in the act, would make the contract one of sale, or would be considered nothing more than a device to disguise usury, we need not stop to inquire. In assuming the position just noticed, the

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defendant has wholly overlooked a previous part of the agreement, by which it is expressly covenanted, that he was to be paid the principal advanced by him, with ten per centum interest. As this was all the law permitted him to receive for the advances made by him, the money could not be in addition, a consideration for either sale or exchange. Hence it is clear he gave nothing for the profits, and to constitute either sale or exchange, one thing must be given for another.

This brings us to the main question in the cause. It is contended that in Louisiana there can be no such thing as an implied partnership; the law contemplates and requires an agreement written, or verbal, to that effect; the assent of the parties to the existence of the partnership is necessary to its formation.

If the law of Louisiana be so, it should be immediately changed by the legislature; for no state of things could be readily conceived, more injurious to the public interests, which would more embarrass commercial transactions, or furnish greater facilities to the commission of fraud. No one could then deal safely with a firm until he examined their articles of partnership. Men might trade under a partnership name, and by a secret agreement among themselves, escape from the responsibility which attached to the character in which they held themselves out to the world. The law is not so understood by the commercial world, and the general understanding on the subject, this court believes is conformable to law. If there even existed no other rules in relation to partnership but those found in the *Civil Code*, which was in force at the time this transaction took place, it would be difficult to come to the conclusion to which the argument offered by the defendant leads us. It is true, that work says, an agreement of the kind is formed by consent alone. But may not consent be proved by acts as well as by words? Are not the acts in truth the better proof, when they are irreconcilable with any other state of things than a partnership? Toullier tells us it is not merely by words or by writings, that consent is shown, it may be proved by signs, by acts, and sometimes even by silence. The permission to

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make this contract either verbally or in writing, is understood by the court, as nothing more than an enunciation of the rule that the agreement need not be reduced to writing. It would be giving an effect to the argument *contrario sensu*, of which we are not aware that any example exists, were we to conclude from these expressions that the legislature intended to introduce a rule of evidence in regard to this contract, which does not exist in relation to any other that may be proved by parol.

But admitting that such was the rule of law as between the partners, there is no foundation whatever to apply it to third parties who trade with them. The general rule is, that every man is bound by the character or quality which he assumes in his contracts. If parties hold themselves out to the world as partners, they are bound as partners by their acts, no matter what may be the agreement between themselves. We are satisfied, therefore, that as to third persons there might have been an implied partnership under our former law. The late amendments to our Code expressly recognise the responsibility which may be incurred, by acts from which such an implication can be made. *La. Code*, 2820.

But this case cannot be decided alone on the provisions found in the *Civil Code* on partnership. That work guarded against the inference of the non-existence of other rules to which courts should recur for the decision of cases before them, by a declaration that its provisions "apply to commercial partnerships inasmuch only as they do not contain any thing contrary to the laws and usages of commerce." When the tribunals of this country were first called on to interpret this, and a similar provision in our law, there was great doubt to what laws and usages of commerce, reference was thus made. It was finally concluded, though not without hesitation, that they must have had in view the usages and laws prevailing in our sister states, unless these laws and usages conflicted with the positive legislation of Spain, or were in opposition to local usages prevailing in Louisiana. Whatever difficulty attended this decision when first made, there can be none in following it now. A considerable time

Previously to the late amendments to the Code, partnership might be implied as to third persons.

The terms, "laws and usages of commerce," in the *Civil Code* were intended to refer to the laws and usages of the other states, unless those laws and usages conflicted with the positive legislation of Spain, or were in opposition to local usages prevailing in this state.

has elapsed since it was made public. Contracts almost innumerable have been executed in reference to it. Rights have been repeatedly adjusted under its authority. Property to a large amount acquired in relation to it; and stranger than all these, the legislature of the state by their silence on the subject, have authorised the belief that the court correctly interpreted the previous expression of their will. We must, therefore, look to the law merchant of the United States, for the consequences attending acts such as are proved in this case, on the defendant. Then, as has been already stated, the question is not susceptible of doubt in relation to strangers contracting with the firm, though as between the parties themselves a different rule may prevail, or one at least modified in many important particulars. It is unnecessary to cite all the cases in which the doctrine has been recognised. One will suffice. The Supreme Court of the United States has lately declared the rule to be perfectly settled, that a party who shares in the profits, although his name be not in the firm, is responsible for its debts. In the present case the defendant contracted for these profits, and received them. 5 *Peters*, 561.

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The agreement was made in 1822, and we have examined the Spanish law to see if there were any positive provisions in it which forbade a partnership being implied from the acts of the parties. We find none such. On the contrary, there is an express law of the Partidas, that if a man is to have a share in the profits of a partnership, he must bear his proportion of the losses. The author of the *Curia Phillipica*, puts several instances from which such a connexion may be inferred.

A minor objection remains to be noticed. It is urged that there is no evidence the goods sold came into the hands of W. & D. Flower, after the time the partnership commenced; and that if they were previously delivered, the defendant can in no event be responsible. We think on the contrary, that it is immaterial when the goods reached them, if (as was the case here,) the firm disposed of them. No matter how irregular the taking possession by the partnership may have been, the owners of the goods had a right to approve of the act, and call on the factors for the proceeds of the sale.

If merchandise is sold by the consignee, his responsibility is the same whether it has or has not come into his possession.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; and it is further ordered and decreed, that the plaintiff do recover of the defendant the sum of twelve hundred and twenty dollars and six cents, with interest from judicial demand until paid, and costs in both courts.

PULLY vs. SPANGENBERG.—COMLY APPELLANT.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

An intervening party residing in Philadelphia, claiming a privilege on property attached in the suit, may show that advances have been made by his agent in New-Orleans, on the property shipped by the latter, and consigned to the correspondent of the party, in Havana; and he may show the manner in which the invoice of the property is made.

A party cannot prevent a cause from being remanded, by admitting the fact, of which the judge of the inferior court erroneously rejected the evidence offered.

This action was commenced by sequestration and attachment of four hundred kegs of lard, by the plaintiff claiming the privilege of vendor. On the day of the purchase, the defendant and vendee consigned the lard to the correspondent, in Havana, of Samuel Comly, living in Philadelphia. It was received and shipped at New-Orleans, by Samuel Thompson. The bills of lading had been signed, and advances made by Thompson on the lard, when the defendant removed from the state. Comly intervened, and claimed privilege on the lard, for his advances.

Judgment was rendered for the plaintiff, and the intervenor appealed.

Maybin, for appellant.

1. The court below erred, as is stated in the different bills of exceptions.

2. The plaintiff did not legally prove his debt.

3. The plaintiff had lost his privilege, and the intervenor had acquired one.

Roselius, for appellee.

1. The plaintiff's case is fully made out by the testimony on record.

2. The lard was still in the possession and at the risk of Spangenberg; therefore Pulley's privilege was unimpaired at the time he exercised it.

3. Thompson was not the agent of the intervenor; the transaction was a personal one; the receipt for the money advanced was taken in Thompson's individual capacity; and there was fraud and collusion between Spangenberg and Thompson.

The opinion of the court, MATHEWS, J. absent, was delivered by MARTIN, J.

Comly, an intervening party, who claims a lien or privilege on the property attached by the plaintiff, is appellant of a judgment in favor of the latter, on a verdict, which he made a vain effort to set aside.

He has drawn our attention to a bill of exceptions to the opinion of the court, who refused leave to ask Crosby, a witness under examination, whether he knew of any advances having been made by Thompson, the intervening party's agent, in New-Orleans, for and on account of him (the intervening party) on merchandise shipped to other places, and how the invoices of shipments were made out. This was objected to, on the ground that the question was irrelevant, as no agency was shown in Thompson to make such advances, and he could not prove his agency.

The intervening party claimed a lien or privilege, for advances made on the merchandise attached, through the

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An intervening party, residing in Philadelphia, claiming a privilege on property attached in the suit, may show that advances have been made by his agent in New-Orleans on the property shipped by the latter, and consigned to the correspondent of the party in Havana; and he may show the manner in which the invoice of the property was made.

A party cannot prevent a cause from being remanded by admitting the fact, of which the judge of the inferior court erroneously rejected the evidence offered.

agency of Thompson. It was not, therefore, irrelevant to establish the fact, that Thompson had, as the agent of the intervening party and for his account, made advances to persons shipping goods to the consignment of the intervening party's correspondent, and to establish, by the conformity of the invoice in the present case, to those of other merchandise on which advances were made, that the goods attached were actual goods on which advances were made. We, therefore, think the Parish Court erred.

But the plaintiff has contended, that he has a right, by his admission of the fact intended to be proven, to prevent the cause to be remanded, and to require our decision of it, on the evidence introduced, coupled with this admission.

When a cause is to be tried by a jury, both parties have an undoubted right to a verdict at their hands, and to their examination of every piece of legal evidence which either of the parties may deem it his interest to present; and neither has a right to withdraw the fair examination of the case on legal evidence, from the jury, and demand our judgment thereon, upon any admission which he may think his interest allows him to make. The party whom his adversary prevents to introduce legal evidence, has no need to eke out, in the best manner he can, the evidence he is allowed to offer; but may at once take his bill of exceptions, and depend on having his case sent back, and the opportunity given him to have any legal piece of evidence he may wish to introduce, presented to the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the court to allow the intervening party to put to the witness the question mentioned in the bill of exceptions; the appellee paying costs in this court.

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May, 1833.

MORTON vs. RILS.

MORTON
vs.
RILS.APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
THIRD PRESIDING.

The declaration of a party to his adversary, or in his presence when admitted uncontradicted or even weakly defended, is admissible when offered by the party who made it, in order to establish the evidence which results from the admission, silence, or weak defence of his adversary.

In an action on a contract for work and labor, where the defendant, pleading that the plaintiff has not performed his obligation, claims of the latter damages in compensation or reconvention, he must prove that the latter has been put in *mord*.

This suit was brought on a breach of a written contract entered into in July, 1830, by which the plaintiff, for one thousand dollars, was obligated to complete all the wood work in erecting for the defendant on his plantation a sugar house, of which the latter was bound to furnish the materials without delay, when they were wanted. The work was to be commenced on the 15th of April, and to be finished in September. The contract contains the following clause: "If the said J. B. Rils makes Morton and his hands wait for timber, as many days as he makes them, he will allow him to finish the work."

The defendant, admitting his signature to the contract, denied that the plaintiff had complied with his stipulations, pleaded payment of a part of the sum agreed on, averred that the work was not finished until November, and that he had thereby sustained the loss of fifty-five acres of sugar cane, valued at two thousand dollars, and five thousand gallons of molasses, valued at seven hundred dollars. He prayed that so much of the plaintiff's account as was just, might be compensated, and for judgment in his favor for the balance.

During the trial several bills of exceptions were taken, which are stated in the opinion of the court.

The jury returned a verdict for the defendant, The plaintiff appealed.

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MARTIN, J. delivered the opinion of the court.

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The plaintiff claims one thousand dollars for work and labor on the sugar house of the defendant's plantation, on a contract according to the intent of which the work is averred to have been done, the plaintiff having been long and often delayed by the defendant's neglect to supply him with necessary or suitable materials.

The answer is the general issue, but it admits the defendant's signature to the contract, it avers the plaintiff's neglect to comply with the obligation he has assumed, and has received partial payments, that the plaintiff was tardy in the performance of his work, and negligent or unskilful in its execution, whereby the defendant lost part of his crop, and otherwise sustained other damage and injury.

There was a verdict in his favor, the plaintiff made an unsuccessful effort to obtain a new trial, and appealed from the judgment thereon.

Several bills of exceptions claim our attention.

I. The first is to the permission given by the court to the defendant's counsel, to ask a witness whether the defendant had not told him he was bound under a penalty of ten thousand dollars, to complete the work on the 15th of October, and that independantly of this sum he would lose his crop, if it was not done; that the plaintiff was not able to pay damages and had abandoned him, that if he would send the witness hands, and complete the work, he would not trouble him. The plaintiff's objection to the question was, that it was an attempt of the defendant to use as evidence for himself his own declarations, out of the plaintiff's presence. The objection was overruled and the plaintiff's counsel took a bill of exceptions.

We are unable to see how a violation of all of the principal rules of evidence could be defended, and think the first judge erred.

II. The next bill is to the court suffering the defendant's counsel to ask, whether his client had not remonstrated with the plaintiff on his frequent absences and great inattention

and neglect, while the work he had undertaken to complete was going on. The objection was merely the same as in the preceding bill. But the cases in our opinion materially differ, the party's declarations to his adversary, or in his presence, when admitted or uncontradicted, or even weakly defended are admissible, in order to establish the evidence which results from the admissions, silence, or weak defence of the party to whom, or in whose presence the declarations are made. We conclude the judge did not err, in permitting the question to be put.

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HILL.

The declaration of a party to his adversary, or in his presence when admitted, uncontradicted or even weakly defended, is admissible when offered by the party who made it, in order to establish the evidence which results from the admission, silence, or weak defence of his adversary.

III. A third bill was to the refusal of the judge to allow a witness on the invitation of the plaintiff, to refresh his own memory by looking over notes of the testimony of the same witness in a former trial. The bill of exceptions does not enable us to judge of the authority of the notes referred to. If they were the witness' own notes, there cannot be any doubt that he might and ought to have been allowed to refresh his memory by recurring to them.

As the bill of exceptions does not enable us to ascertain what notes are referred to, we must decline acting on them.

IV. The last bill was to the introduction by the defendant, of evidence of the damages claimed in the answer.

The objections were, the absence of an allegation of the plaintiff being *in morâ*, that from the nature of the contract and the defence, there could not be any other breach of the contract, than a *positive* one; that the contract states a specific time of performance, and lastly, that if the party be not *in morâ*, no defence or evidence is admissible, which does not tend to show a non-performance, in relation to the work or its price, but not in relation to damages.

The testimony was admitted as far as it tended to establish damages or compensation, and the bill of exceptions was taken.

Damages are not to be claimed of a party, till he has been put *in morâ*, (*La. Code*, 1927,) in the case of a negative breach. Here the allegation is that the party neglected to perform the obligation. There cannot be any good reason

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In an action on a contract for work and labor, where the defendant, pleading that the plaintiff has not performed his obligation, claims of the latter damages in compensation or reconvention, he must prove that the latter has been put in *morâ*.

that the circumstance of putting in *morâ* should be dispensed with, where damages are claimed in compensation or by reconvention. A party's claim on a contract may be an evidence of his not having performed the obligation incumbent on him, notwithstanding he never was put in *morâ*, but where damages are claimed from him, the putting him in *morâ* cannot be dispensed with, and must be proved.

As illegal evidence, was admitted, and the case was tried by a jury, the appellant has a right to have the case remanded for a fair trial by jury, on legal evidence only.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside and the case remanded for a new trial, with directions to the judge not to admit the testimony referred to in the first bill of exception, nor to admit evidence of damages claimed, or compensation for the alleged negative breach of the contract, without legal evidence of his having been put in *morâ*: It is further ordered that the appellee pay costs in this court.

Burk and Davis, for appellant.

HENDERSON ET ALS. vs. MAYOR, &c. OF NEW-ORLEANS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The corporation of the city of New Orleans, possesses such power only, as has been delegated by the legislature; and no power has been delegated to appropriate to the public use, private property, without paying its value to the proprietor.

A front proprietor of land, has, at any time, the right to call for a jury, to decide, if a change in the levee can be safely made; and if it can, they have no authority to refuse permission, because the proprietor will not surrender part of his property to the public, or burthen it with a servitude, to which other lands are not subjected.

EASTERN DIST.
May, 1832.

HENDERSON
ET AL.

VS.
MAYOR, ETC. OF
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This action was commenced by Stephen Henderson and others, front proprietors of lots in the faubourgs Delor and Saulet, in the upper part of the city of New-Orleans, to prevent the Corporation from proceeding to open and lay out a public street and levee over the borders of their lots, formed by the batture; or if the Corporation be allowed to proceed, that the street and levee be restricted to the necessary limits, and the corporation required to compensate the owners, by paying the value of the land used.

The petitioners allege, they are riparian proprietors of these unincorporated faubourgs of the city, and that they hold several lots, fronting on New-Levee and Tchoupitoulas streets, situated on the batture, and forming part of a rural estate, fronting on the Mississippi. That by an agreement annexed to their titles, they are entitled to all the future increase of the batture in the rear of their lots. The rural estate of which their lots form a part, they allege, has furnished successively, two highways to the public, both of which are open, and that one of them has been given without compensation; that a good levee has also been made by them, between the highway and the river.

They further state there is a batture in front of their lots at low water, from one to three hundred feet wide, sufficiently elevated to be reclaimed; that several parts of the batture are now raised above high-water mark, upon which is erected valuable improvements, such as wharves, saw-mills, timber and coal yards, which have been several years in use, and are of great service to the port.

They then allege that the act of the legislature of March 16, 1830, and the city ordinance of October, 1830, under which the corporate authority is proceeding to demolish these works on the batture, and to lay out the said street and levee

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over their lots, are unconstitutional. That by this proceeding, the corporation has slandered their titles to their damage, twenty thousand dollars; and the strip of land about to be taken for the street and levee, they allege is worth one hundred thousand dollars.

An injunction was granted, staying the proceedings of the defendants.

The counsel for the corporation, denied the plaintiffs' allegations, and averred that by the laws of Louisiana, no person has the right to erect work or buildings on the beds of rivers or navigable streams, or obstruct the public use of them. That no person is permitted to make any new levee or embankment in front of those which formerly existed, without the authority of the corporation or police jury of the parish; and that these authorities respectively within their limits, have power to make all needful regulation respecting causeways, bridges, levees, and other public highways; to remove old levees, and make new ones.

The defendants further aver, that the property in contest, lies in the suburb Delor, which is incorporated, and the corporation is entitled to all the alluvian newly created, adjacent to the levee, and made at its expense, in the whole extent of the limits of the city of New-Orleans.

The mayor of the city answered separately, and averred that he had notified the petitioners to demolish and remove the works and obstructions they had erected on the batture in question, and justified his proceedings under the act of March 16, 1830, entitled "An Act concerning Levees," &c. and the city ordinance of October, 1830. He prayed that the injunction be dissolved.

The city surveyor deposed, that the old levee in front of the suburb Delor, as it now stands is front of New Levee street, and that the distance between the proposed new levee and street, and the bank of the river at low water, is at the widest part from eighty to one hundred feet, and at the narrowest, from fifteen to twenty feet wide. He also stated that there were two saw-mills, other works and buildings erected on the

batture, which obstructed the navigation of the river, and encroached upon the projected new levee and street, and that the banks of the river were much encumbered with lumber and other obstructions.

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NEW-ORLEANS.

The record contains the following admission. "It is admitted that the plaintiffs are the proprietors of the different lots of ground as stated in their petition, and as such, entitled to the increase of the batture in front of the same."

There was judgment dissolving the injunction and recognising the authority of the Corporation to clear the shores of the river, to remove obstructions, to determine what space should be left open along the same, and to lay off levees, streets and highways, &c. From this judgment, the plaintiffs appealed.

On the appeal, the judgment of the District Court was affirmed. *Vide 3 La. Rep. 563.*

At the second trial, the District Court again dissolved the injunction, but only so far as related to making the levee, and continued it in force as to the opening of the new street, until the plaintiffs were indemnified and compensated for all the damages and loss sustained by them, in consequence thereof.

It was admitted by the parties as follows, viz: 1. "That the ground in controversy formed part of a rural estate, of which Madame Delor Sarpy was owner."

2. "That Madame Delor Sarpy was the true and lawful owner of the batture in front of said estate."

3. "That all the plaintiffs derive title from Madame Delor Sarpy."

Two witnesses deposed that Tchoupitoulas street was the high road and levee in front of the property of Madame Delor Sarpy and Saulet, until 1808; that the present road and levee is now between Tchoupitoulas street and the river, called "*New-Levee street*," which was made by the proprietors of property in front of the faubourgs Delor and Saulet, and is now open and used as a public highway.

A plan and representation of the *locus in quo*, embracing the batture, lots and works of the plaintiffs, and the situation

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of the faubourgs Delor and Saulet, was introduced in evidence.

Judgment having been rendered on the second trial for the plaintiffs, the defendants appealed.

PORTER, J. delivered the opinion of the court.

The plaintiffs state themselves to be the riparian proprietors of front lots of certain unincorporated faubourgs of the city of New-Orleans, and from the petition filed by them, it appears they had several objects in view. 1. To prevent the corporation from making a levee on the batture lying in front of their property. 2. From making a road. 3. To prevent the mayor from removing or causing to be removed, certain works which they had erected on the said batture; and, 4. In case the court should decide that the corporation had the power to order a new levee and road, that they might be decreed to make compensation to the plaintiffs, for the ground so taken for the road and levee, or for that which they had formerly furnished to make another road, lying further back from the river.

The pleadings and proceedings in the court of the first instance, enabled the parties to bring before this court by appeal, the question in relation to the right of the corporation, to remove the obstructions which the plaintiffs had interposed to the public use of the batture. We were of opinion the mayor of the city had a right to abate them; but we reserved the questions as to the claim for compensation for the ground which was to be taken for a road and levee.

The parties have since litigated this matter; and the defendants have appealed from the judgment of the District Court, which absolved them from any claim for the land taken as a levee, but condemned them to remunerate the plaintiffs for that destined for a road or street.

The argument at the bar, covered a great deal more ground than we have found it necessary to examine, in making up our minds on the rights of the parties. An inquiry

into the general principles of law, in matters of this kind, we consider unnecessary, as in our judgment, the case must be decided on the positive enactments of the statute law of the state.

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ET ALA.

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It appears from the evidence in the cause, that two roads have been previously taken by the public over the land which the plaintiffs now own. The first is proved to have existed sixty years, and is most probably that which was laid out immediately after the land was conceded, and in virtue of a condition express or implied in all grants of land by the former governments of Louisiana, that the grantee should furnish ground for a public highway. The second is of much more modern destination. Both are now used by the public.

As the condition in the original grant has been complied with, we are compelled to look elsewhere for the authority of a municipal body, to appropriate the land of individuals to their purposes, or to the use of the public, without compensation. Our researches in this object, have been wholly unsuccessful. The *Louisiana Code* expressly declares, that "no one can be divested of his property, unless for some purpose of public utility, and on consideration of an equitable and previous indemnity, and in a manner previously prescribed by law." *La. Code.*

Admitting the right to property, and the right that it shall not be taken from the owner without compensation, to exist in Louisiana merely at the will of the legislature, and that it cannot claim a higher sanction and a more powerful protection from principles, which if not expressed in the constitution of the state, necessarily flow from free institutions, we have been unable to find any law which sanctions the pretensions of the defendants. There is, on the contrary, express legislation in opposition to them.

By the 15th section of the original act of incorporation, a power is given to the Corporation, to open, widen, and continue streets, "and if for such purpose, the ground of any person or body corporate is necessary to be had, the city council shall endeavor to purchase the same at a reasonable price." The act then proceeds to provide, that in case the

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proprietor and the city representatives cannot agree on the price, a jury shall be called to assess the value, and the damages the owner may sustain. 2 Moreau's Digest, 115.

After an interval of twenty-seven years, we find the legislature of the state acting on this subject, and with a perfect conformity in relation to the right of owners of property, required for municipal purposes, being reimbursed. The first section of the act entitled "an act to regulate the opening, laying out, and improving streets and public places in New-Orleans, and its suburbs corporated and non-incorporated, and in the *banlieux* of the same," gives, in terms more comprehensive than the act of 1805, the authority to the mayor and city council, to lay out, form, or open any street, place, &c. and to take possession of any lots, &c. necessary for this purpose; but it further provides, that if the owners of the property sustain a loss by the act of the corporation, compensation shall be made to them in the manner pointed out by subsequent provisions in the statute. See acts of 1832, 133.

Whatever power, therefore, the legislature may have over private property, it is clear to us, that they have only delegated to the corporation of New-Orleans, the right to apply it to their, or public use, on paying the proprietor for the loss he may sustain by such a destination being given to the ground belonging to him; and we are equally clear, that the corporation can possess no more authority on this subject, than the legislature has conferred on them.

It was, however, contended, that this case presented an exception to the rule just stated, because here it was in the power of the corporation, to have refrained from ordering the levee to be advanced nearer the river; and if they had so refrained, the property would have remained batture, subject to the public use; it would have made a part of the bed of the river, and of the port of New-Orleans. From these postulates, it is concluded that as they had the power to make the ground susceptible of private ownership, they had a right to impose any conditions they pleased in rendering it so, and that hence the plaintiff cannot complain, if a part is appropriated to a road.

The corporation of the city of New-Orleans, possesses such power only, as has been delegated by the legislature; and no power has been delegated to appropriate to the public use, private property, without paying its value to the proprietor.

This reasoning, however specious it may at first appear, is not, in our opinion, sound. It proceeds on the idea, that the permission to extend the levee, is a boon conferred by the public on the proprietor, which may be granted or refused on an arbitrary discretion. We, however, think that every front proprietor has a right to call for a jury, to decide whether the change in the levee can be safely made or not, and if the facts require them to say so, that they have no authority to refuse the permission, because the owner will not surrender part of the property to the public, or burthen it with servitudes to which other lands are not subject. The laws of the country give to the front proprietor, all the batture formed in front of the soil owned by him on the banks of the river. When this batture has risen to a height to be susceptible of private ownership, it becomes as much his property as the land it is attached to. Motives of public policy, it is true, have induced the legislature to prevent him from using it without the consent of twelve riparian proprietors; but when the public safety is not endangered, the consent ought not to be wantonly refused. At all events, if granted, it cannot be clogged with conditions inconsistent with the rights arising out of that situation of the property which authorises the jury to permit the levee to be advanced nearer the river. The act of 1808, which requires a jury to be summoned, does not authorise any condition to be imposed in granting the permission asked for.

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A front proprietor of land, has, at any time, the right to call for a jury, to decide if a change in the levee can be safely made; and if it can, they have no authority to refuse permission, because the proprietor will not surrender a part of his property to the public, or burthen it with a servitude to which other lands are not subjected.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs.

Eustis, for appellants.

Hennen and Rost, for appellees.

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**WEST, &
SYNDIC, ETC.**

**vs.
McCONNELL.**

WEST, SYNDIC, &c. vs. McCONNELL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The pendency of a suit, no matter by what process commenced, in the court of another state, cannot be pleaded to an action instituted in a court of this state.

An attachment, issued in a suit in another state, on the same cause of action, may modify the relief to which the party is entitled in a court of this state.

Where the records of two suits in another state, sewed together, were duly certified by the clerk, on the 13th and 14th of a certain month, and the judge certified, at the end of the second record, to the official character of the person acting as clerk on those days; *held*, that the judge's certificate was sufficient, no proof of fraud in annexing the records having been adduced.

It is unnecessary for a party to specially plead matters which may or may not become material, according to the course which his adversary may adopt.

The insolvent, previously to his failure, had accepted and paid bills of exchange drawn upon him by the defendant, residing at Nashville. The bills, and the balance of account in the plaintiff's favor, amounted to three thousand six hundred and forty-six dollars and fifty-one cents, to recover which this suit was brought. A writ of attachment was issued, under which a quantity of merchandise was seized. Judgment was rendered for the plaintiff. On motion of defendant's counsel, a new trial was granted, and afterwards a second judgment was rendered for the plaintiff, from which the defendant appealed.

Kelly, for appellant, contended,

1. That the pendency of a suit, by foreign attachment in Kentucky, for the same debt, is a good plea in abatement to

another suit afterwards brought in this state, by foreign attachment, for the same debt.

2. That the seizure of property enough to pay the debt, under the lawful authority of any court, either on original or final process, operates a discharge of the debt.

3. That a seizure of double the amount of the debt, is illegal, excessive and unjust.

4. That judgment should have been given for the defendant.

Carleton and Lockett, for appellee.

PORTER, J. delivered the opinion of the court.

This suit is brought to recover from the defendant, a debt due to the insolvent previous to his failure, and an attachment was levied on property of the defendant, found within the jurisdiction of the court.

There were two trials in the court below, and on both the decision was in favor of the plaintiff. The proceedings in the court below, and the causes which induced the judge to order a new trial, need not be set out, as the case turns on matters which are not affected by them. The existence of the debt appears to be sufficiently proved. The principal question in the cause, relates to the effect which an attachment should have, that was levied by the plaintiff on goods of the defendant in the state of Kentucky, and which attachment was in force at the time this suit was instituted.

The defendant has pleaded the suit in Kentucky, on which the attachment issued, in abatement of the present action; and he has further pleaded, that the plaintiff had, previous to the institution of this suit, funds belonging to the defendant to an amount sufficient to satisfy the claim of the petitioner.

On the first point, we think, the pendency of a suit for the same cause of action, in another state, cannot abate a suit in our courts; and the principles on which this doctrine has been established, and so generally recognised, are not at all

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of a suit, no matter by what process commenced

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in the court of another state, cannot be pleaded to an action instituted in a court of this state.

An attachment issued in a suit in another state, on the same cause of action, may modify the relief to which the party is entitled in a court of this state.

affected by the process which the plaintiff may resort to in another country to enforce or assure his rights. We cannot distinguish between the effect of a suit in which attachment issued, and one where the defendant was arrested and held to bail.

But though that attachment cannot deprive the plaintiff of the aid of our courts to enforce his rights, we are of opinion, for reasons which will be given hereafter, that it may have effect in modifying the relief to which he is entitled here; and it therefore becomes necessary to examine the exceptions taken to the evidence by which the defendant attempted to establish the pendency of the suit in Kentucky.

The defendant produced in evidence, two records, sewed together. One, of the suit of the present plaintiffs against the defendant, and another, of the suit of the Bank of the United States against the plaintiffs, by which they attached and seized the debt the petitioner was attempting to recover from the present defendant.

At the end of the first record there is a certificate of the clerk in due form, but it is not followed by that of the judge. At the end of the second, there is also a certificate of the clerk in due form of law, and to this the following certificate of the judge is added. "I, Thomas T. Crittenden, sole judge of the Jefferson Circuit Court, in the state of Kentucky, do certify that Worden Pope, whose certificates and attestations are made to accompany this record, was, on the days of his certificates and attestations, viz: on the 13th and 14th days of November, 1832, clerk of the Jefferson Circuit Court in Kentucky, and keeper of the seal of said court; and that his certificates are in due form of law, and entitled to full faith and credit."

On referring to the attestations of the clerk, we find that one of them was made on the 13th and the other on the 14th, as the judge states. It is contended that his certificate cannot justify the introduction of the first record, because *non constat*, that is, that which he refers to; that another record might have been obtained and attached to the last

made out; and that such a loose mode of introducing documents would afford means for the practice of fraud.

It is not suggested that any attempt to substitute one record for another, was made here. Such an act would be highly criminal, and the court cannot presume it. We are satisfied in the present instance, that the certificate of the judge refers to the two attestations of the clerk produced in evidence, and we see nothing in the act of Congress which authorises us to reject them, because the judge certified both at the same time.

But another objection is made to the introduction of the record on the part of the United States Bank against the plaintiff. It is contended that the defendant should have specially pleaded the existence of the suit. We think otherwise. It is not necessary for a party to set out all the evidence on which his case is to be maintained; and more particularly, it is not required to set out matters which may or may not become material, according to the course which his adversary may adopt. In the present case, the gist of the defence was the attachment previously levied by the plaintiff, on property of the defendant, for the same debt. The circumstance of the right of the plaintiffs in that debt being subsequently attached, was only important in giving further effect to that suit, and in showing that there existed impediments to the plaintiff's releasing him from the consequences of it, if he attempted to do so, to enable him to recover here.

The fact of the Bank of the United States having attached the plaintiff's right to the debt due by the defendant, would not, indeed, be at all material in this case, were it not for a proposition made by the plaintiff, that he was willing to renounce all benefit to the action pending in the state of Kentucky, and to make that entry on the record.

We have already stated, that the pendency of the suit in Kentucky, cannot be pleaded in *abatement*, so as to cause the dismissal of the action brought in our courts, but we think the facts disclosed by the record of that suit, offer controlling considerations, why the judgment to be rendered in this

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Where the records of two suits in another state, sewed together, were duly certified by the clerk on the 13th and 14th of a certain month, and the judge certified at the end of the second record, to the official character of the person acting as clerk on those days; held that that the judge's certificate was sufficient, no proof of fraud in annexing the records having been adduced.

It is unnecessary for a party to specially plead matters which may or may not become material according to the course which his adversary may adopt.

Court, evidence that the attachment issued by him in the Jefferson Circuit Court of the State of Kentucky, shall have been dismissed with leave of that court; or that, if he proceeds to final judgment in said cause, until he enters as credit on the judgment now rendered, the net amount of the proceeds of the property so attached by him in the said court; and it is further ordered, that the appellee pay the costs of this appeal.

EASTERN DISTRICT,
May, 1882.

LABADIE
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GUERIN.

LABADIE vs. GUERIN.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A testamentary executor, claiming the possession of the estate, but not showing that the execution of the will has been authorized by the Court of Probates, must be considered as a mere stranger; and against him the heir for a part only, is entitled to the possession of the whole estate.

An act which is forbidden, may become lawful by the happening of a contingency which renders it necessary and regular.

This action was brought by an heir to recover the succession of her deceased grand-son, in the possession of the defendant. He died a minor, a few days after his father's death. The defendant was enjoined from selling or disposing of the property belonging to the succession claimed.

The defendant specially denied the plaintiff's alleged heirship; averred that the death of the son preceeded that of the father, who thereby became the heir of the former; and that by the father's will he was appointed his executor, and as such was entitled to the possession of his property. He did not however show that the will had been admitted to probate.

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GUEBIN.

Judgment was rendered for the plaintiff and the defendant appealed.

The opinion of the court, **MATHEWS, J.** absent, was delivered by **MARTIN, J.**

The plaintiff, as grand-mother and heir of **V. Labadie**, claims his estate in the hands of the defendant, and prays he may be enjoined from selling it.

The defendant denied the plaintiff being heir, or having any interest in the estate, averred that he is executor to the will of **Dr. Labadie**, father of the plaintiff's alleged grandson, and as such possessed himself of the testator's estate, and was preparing to sell it, in pursuance of the directions of the will; that **V. Labadie** left a half sister on the mother's side, and a niece, the daughter of another half sister on the maternal side.

The plaintiff had judgment and the defendant appealed.

The record shows the death of **V. Labadie**, his father, and mother, there is no evidence of his having left any dependant or collateral relations, as stated in the answer.

A testamentary executor, claiming the possession of the estate, but not showing that the execution of the will has been authorised by the Court of Probates, must be considered as a mere stranger; and against him the heir for a part only, is entitled to the possession of the whole estate.

The defendant has not shown that the executor of the will was authorised by the Court of Probates. He must, therefore, be considered as a mere stranger, against such the plaintiff must not necessarily show herself entitled to the whole estate, to demand the surrender of it. It suffices she should show she is heir for a part.

She has shown she is the paternal grand-mother, but she has not shown that the paternal grand-father, nor the maternal grand-father, are dead. It is, therefore, possible, that she is entitled to one-fourth only of the estate, and this suffices to entitle her to recover the whole of it from a stranger.

An act which is forbidden, may become lawful by the happening of a contingency which renders it necessary and regular.

We had doubts whether the judge did not err in making the injunction to sell the estate, as the will of the father may be proved, and ordered to be executed, and the executor then be authorised to sell, but we have considered that an act

hibited to be done, may become lawful by the happening of a contingency, which renders it necessary and regular.

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KEENE
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LIZARDI
ET ALS.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

Wadsworth, for appellant.

Roselius and McMillen, for appellee.

KEENE vs. LIZARDI ET ALS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT

The master of a vessel is liable for the indecent and inhumane conduct of himself, and of his crew, excited by him towards a passenger.

Owners of vessels carrying passengers for money, are subject to the same responsibility for a breach of duty by their officers to the passengers, as they would be in regard to merchandise committed to their care.

The facts are fully stated in the opinion of the court, delivered by **PORTER, J.**

The petition states, that the plaintiff and his wife embarked at Vera Cruz, as cabin passengers, on board a schooner belonging to the defendants, bound to the port of New Orleans. That the vessel had on board a nominal commander called Narciso Fernandez, but that the real and effectual commander was one Manuel Gastanaga, who was entitled the *piloto*. That the said *piloto*, virtually and effectually the sole and absolute commander of said vessel during said voyage, availed himself of every occasion to violate, not only the rules of decency, decorum and respect, but also to

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outrage humanity itself towards the petitioner and his wife, and to expose their very lives to be sacrificed to his unofficer-like and atrocious conduct. That, furthermore, to gratify his fiend-like malignity and brutality, he, the said piloto, spoke also of the wife of the plaintiff, in the hearing of all his crew, as if to stimulate them to personal outrage against her, as not being the wife, but the *mistress* or *prostitute* of the plaintiff, and finally, that during the space of fourteen days, owing to the atrocities of the *piloto*, the petitioner and his wife were in constant apprehension of being assassinated. The damages are laid at twenty thousand dollars, and it is averred that the defendants as owners of the vessel, are responsible for the acts of their agents.

The defendants filed a peremptory exception, in which they denied that they were responsible to the plaintiff on the facts alleged by him. The court below sustaining the exception. The judge admitted the owners were responsible for loss occasioned by the neglect, and even by the torts of their agents, but that they were not responsible for malicious and defamatory expressions of the officers on board.

For the purposes of this inquiry, all the facts and allegations contained in the petition, must be taken as true. It, therefore, appears, the officer in command of the vessel, treated the petitioner and his wife, inhumanely and indecently, that he did not extend to them that protection and care which is usual, that he stimulated his crew to commit outrages on them, and that during the space of fourteen days, they were, in consequence of his conduct, in constant danger of their lives.

The questions, therefore, are whether the officer himself would be liable to an action for such conduct? and if he would, whether the owners of the vessel are responsible for his acts?

The master of a vessel is liable for the indecent and inhumane conduct of himself, and of his crew, excited by him towards a passenger.

L. And on the first question we are clearly of opinion, that if such acts as are admitted by this exception, were proved in evidence, the master would be responsible in damages to the parties injured. We were about to express our own ideas on the obligations of masters to passengers, when we

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fell on a case not cited on the argument, where the law on this subject is so clearly stated, and in language so much more forcible than any we could employ, that we shall resort to it as expressing fully our ideas on this subject. In the case of *Chamberlain vs. Chandler*, reported in 3 *Mason*, p. 142. Judge Story says, "In respect to passengers the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence on board, but for reasonable food, comforts, necessities, and kindness. It is a stipulation not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet farther, it includes an implied stipulation, against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors by the excitement of terror and cool malignancy of conduct to inflict torture on susceptible minds." After noticing the argument that the acts complained of, though wrong in morals, were not cognisable by law, he observes, "my opinion is the law involves no such absurdity. It is rational and just. It gives compensation for mental suffering, occasioned by acts of wanton injustice, equally, whether they operate by way of direct or consequential damage." If the principles here so eloquently expounded, and which we think must receive the ready assent of every sound head, and of every pure heart, required the further weight of authority to give their sanction, we have that authority in Chancellor Kent. "The duties of the master, (he says) and particularly the necessity of kind, decorous and just conduct on the part of the captain to the passengers and crew under his charge, and the firm purpose with which courts of justice punish in the shape of damages every gross violation of such duties, are no where more forcibly stated than in the case of *Chamberlain vs. Chandler*," 3 *Kent's Commen.* ed. 1832, 160.

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Owners of vessels carrying passengers for money, are subject to the same responsibility for a breach of duty by their officers to the passengers, as they would be in regard to merchandise committed to their care.

II. On the second point, the exposition just given of the duties of the master, in relation to the passengers, renders it easy to ascertain the extent of the responsibility of the owners for a breach of those duties. The law is clear and perfectly well settled, that owners of vessels are responsible for all acts of the master, while acting within the scope of his duties, even for his torts. When the proprietors of vessels use them for the purpose of carrying passengers for money, they subject themselves to the same responsibility for a breach of duty in their officers to those passengers, as they would for their misconduct in regard to merchandise committed to their care. No satisfactory distinction can be drawn between the two cases.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, and it is further ordered, that the exception filed in this case be overruled and set aside, that the case be remanded to the District Court, to be proceeded in according to law, and that the appellees pay the cost of this appeal.

Appellant, in propria persona.

C. De Armas, for appellees.

LANDREAUX vs. BEL.

APPEAL FROM THE COURT OF PROBATES OF THE PARISH AND CITY OF NEW ORLEANS.

The 39th article of the Louisiana Code, relates only to the inventory made by the tutor of his minor's property, and cannot be extended to all cases in which minors may be interested.

Where a tract of land and several buildings belonging to a succession, were in the inventory appraised *in globo* for a certain sum, and a division of the property was made into three parts, agreeably to the request of the widow and, the deliberation of a family meeting for the minor children of the deceased; and two of those parts were adjudicated at public auction—*held*, the purchaser could not be compelled to execute the contract, until the other part should be sold, unless a bond of indemnity were given to him.

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The widow of Honoré Landreaux, acting in her own name, as having been in community of acquets and gains during her marriage with the deceased, and as tutrix of their minor children, claimed the execution of a contract of sale, made by adjudication at public auction, under the order of the Court of Probates, upon the advice and consent of a family meeting duly homologated. The land sold belonged to the community which had existed between the plaintiff and her deceased husband.

No answer was filed, the cause was submitted, by consent, to the judge *a quo*, who rendered judgment for the plaintiff, from which the defendant appealed. The statement of facts on which the cause was submitted, is given in the opinion of this court.

The opinion of the court, MATHEWS, J. absent, was delivered by MARTIN, J.

The defendant is appellant from a judgment by which he is ordered to comply with the conditions of a sale, in which a house and lot was adjudicated to him as the last bidder, by giving his notes, according to the terms of the sale.

The case has, by consent, been submitted to us, upon the judgment appealed from and the articles of the Code cited therein, and the following facts.

I. The premises are a part of a larger lot and several buildings, appraised *in globo*, in the inventory, at thirty thousand dollars.

II. The whole was afterwards divided into three lots, by the deliberation of a family meeting, which was duly homologated.

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III. In pursuance thereto, two of these lots were sold, one for ten thousand six hundred dollars, to the defendant, and another for seven thousand dollars; the third was not offered for sale, but withdrawn; and the widow is disposed to take it for fourteen thousand dollars; these three sums exceed, by one thousand six hundred dollars, the price at which the whole property was appraised.

The counsel for the appellant has contended, his client was willing to comply with the terms of the sale, if he were secured by a bond of indemnity against the danger which he apprehends from apparent irregularities in the inventory of appraisement, and in the sale, viz:—the appraisers were appointed and sworn by a notary public appointed by the Court of Probates; nothing shows the appraised value of the property purchased by the defendant.

The Court of Probates was of opinion that the appraisers were properly appointed and sworn by the notary; the article 1098 having an express provision, giving authority to appoint and swear appraisers to the judge or notary, who makes the inventory.

The appellee has contended, that the power given to notaries by this article, is confined to cases in which the judge is not expressly required to make the appointment himself, and the present one is said to be one of those, as minors are interested in the property inventoried. *Id.* 329.

It has appeared to us, there is nothing in this objection; the article 329 relates only to inventory made by tutor of his minor's property; and we have no authority to extend it to all cases in which *minors* may be interested.

The property was duly appraised, and with the view of facilitating its bringing the appraised value, the family meeting directed it to be divided into three lots, and sold accordingly.

The validity of the sale of the first and second of the three lots was in suspense, till the third brought a sum, which added to the price at which the other two had been adjudicated, formed an aggregate sum equal to or exceeding the value fixed on the whole property by the appraisers.

The 329th article of the Louisiana Code, relates only to the inventory made by the tutor of his minor's property, and cannot be extended to all cases in which minors may be interested.

The lot which remains unsold, we are informed, the widow who is the petitioner in the present case, is disposed to take at a price, which added to that at which the other two were adjudicated, will cause the aggregate produce of the sales of these three lots to exceed the sum of thirty thousand dollars, at which the whole property was appraised. This, however, has not yet been effected; the lot is still unsold, and has not yet been adjudicated to the widow. Till this be done, and legally done, the defendant is not perfectly secure in his title, and, it appears to us, he did no injury to the estate, in requiring, before he gave his notes, to demand security against any accident.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed, and the plaintiff's petition dismissed, she paying costs in both courts.

Soulé, for appellant.

Mazureau, for appellee.

COLLETON, ET AL. vs. DE ARMAS.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

If a plaintiff have two rights of action, which may both be exercised, or cumulated in the same suit, a judgment against him on one right, cannot be pleaded as *res judicata* in an action by him on the other.

Colleton and Adams, the present plaintiffs, brought an action and recovered judgment, in December, 1831, against McLeary for seven hundred and eighty-one dollars, with in-

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Where a tract of land and several buildings belonging to a succession, were in the inventory appraised in *globes* for a certain sum, and a division of the property was made into three parts, agreeably to the request of the widow, and, the deliberation of a family meeting for the minor children of the deceased;—and two of those parts were adjudicated at public auction, *held*, the purchaser could not be compelled to execute the contract, until the other part should be sold, unless a bond of indemnity were given to him.

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terest, for work and labor performed by them for McLeary, on the house of the present defendant, in whose hands that amount had, at the commencement of the suit, been provisionally seized. De Armas had become personally liable to the plaintiffs, by his promise to pay them, among other workmen, for their labor and materials for his house.

The defendant excepted, that another suit upon the same claim, had been instituted, and had been decided in his favor, or was then pending; and that the costs of the former suit had not been paid. He pleaded the general denial, collusion by the plaintiffs and McLeary, and a renunciation of the plaintiffs' claims against him, in consideration of a certain sum of money.

The judge *a quo* sustained the exception, and dismissed the petition. The plaintiffs appealed.

Roselius, for appellants.

McMillen, on the same side, made the following points.

1. The judge of the Parish Court erred in dismissing the plaintiffs' petition, because no other suit existed at the time for the same purpose between the same parties.

2. If the institution of the present action was not a sufficient renunciation of the right to appeal, the formal renunciation, on calling up the cause for trial, was so; and if there had been any validity in defendant's exception, such exception was destroyed by such renunciation.

3. The pleadings in the cause do not admit of the judgment which has been rendered; as the plea is that of *res judicata*.

Denis, for appellee.

The opinion of the court, **MATHEWS, J.** absent, was delivered by **MARTIN, J.**

The plaintiffs and appellants, complain that the Parish Court erroneously sustained the defendant's plea of *litispendence*, and dismissed their suit.

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They had bestowed labor and materials on a house of the defendant, at the special instance and request of McLeary, with whom the defendant had made a contract for building the house; and had obtained judgment against McLeary; and on allegations that according to the contract between their debtor and the defendant, there was a sufficient sum due from the latter to the former, to satisfy their claim, they took a rule against the defendant, to show cause why he should not be doctored to pay it to them. Judgment having been given on the rule, it was appealed from, but the appeal was dismissed on the ground of its prematurity, the judgment not having been signed.

Afterwards the present suit was brought, in which the plaintiffs, alleging that the defendant, in order to expedite the completion of the work they had undertaken at the instance of McLeary, promised to pay them therefor. He pleaded the pendency of the summary action, originated against him by taking the rule.

The counsel of the plaintiffs has contended that the Parish Court ought not to have sustained the plea or exception of *litispendence*, because,

1. No other suit was depending for the same purpose between the same parties.

2. If any other suit existed, it was only a rule to show cause, why the defendant should not pay the plaintiffs a sum which he owed to McLeary, to whose rights they were by law subrogated, while the present action was for the recovery of a sum, which they claim on the defendant's own promise to them.

3. The action on the rule no longer exists after the dismissal of the appeal.

4. If the present action be not a sufficient renunciation of the right of appeal, the formal renunciation of the defendants, when the cause was called up for trial, suffices.

5. The pleadings do not justify the judgment, the exception being that of *res judicata*.

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VS.
DE ARMAS.

6. A trial by jury was asked, and the plaintiffs could not, without their consent, be deprived of it.

7. The right of appeal was a remedy which the party might resort to or abandon, at pleasure.

The counsel for the defendant has replied, that the proceedings on the rule were a summary action, by which the plaintiffs sought to recover the very money they claim in the present action. That the dismissal of the appeal, leaves the proceedings on the rule in the state in which they were, before the appeal was taken. That the institution of the present suit wrought no renunciation of the right of appeal. That the exception is both on the ground of *res judicata* and *litispence*; that there being no issue on a matter of fact, the question of law arising in the exception was properly acted upon by the court.

It appears to us the court erred. The plaintiffs have two rights of action, the one resulting from the law—the other from the promise of the defendant. They had a right to exercise them both, and even to cumulate them in the same action. *Code of Practice*, 151. It is true, a recovery in one of the actions would put an end to the other. He was in the case put by this article of the *Code of Practice*, i. e. that of a man who claims a slave under a will and under a contract. In resorting to the claim under the will, he need not abandon, for he may even cumulate, that on the contract, and *vice versa*.

The *Code*, in the preceding article, gives us an instance of distinct rights, arising on the same contract, the exercise of either of which is inconsistent with the other. The vendor cannot claim the price and the rescission of the sale. If he cumulates these claims, the court will compel him to make his election, and abandon one of them.

The recourse of the plaintiffs to the right that the law gave them, did not affect that which they have on the contract, and they might exercise, even after a judgment against them on the rule.

The proceedings on the rule, were erroneously considered as a legal exception to the plaintiff's proceeding in the ordinary way.

If a plaintiff have two rights of action, which may both be exercised, or cumulated in the same suit, a judgment against him on one right, cannot be pleaded as *res judicata* in an action by him on the other.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, the exception over-ruled, and the case remanded for further proceedings, according to law; the appellee paying costs in this court.

EASTERN DISTRICT,
May, 1833.

GRAVIER
vs.
ROCHE.

GRAVIER vs. ROCHE.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

In an action to rescind the sale of property of a defendant in execution, seized and sold to satisfy the judgment, he will not be permitted to show payment of the demand on which the judgment was founded, previously to its rendition.

The defendant in execution, whose property has been sold, and the sheriff's deed given, is not bound by a subsequent *ex parte* amendment of that deed.

The sale of a square passes a certain tract bounded by streets, and all the space which is included by the streets intersecting each other.

The plaintiff claimed the rescission of a sale of a square of ground which he had formerly owned, and which, under an execution on a judgment against him in the defendant's favor, had been adjudicated to the latter. The sheriff's return under which the property was sold, declares that he had "seized a square of ground bounded by Pigeonier or Perdido, Gravier, and St. Paul, and Girond streets." The act of sale, recorded 8th June, 1825, conveyed a square "bounded by Pigeonier, Perdido, Gravier, and St. Paul streets." In May, 1831, the agent of Mrs. Roche made affidavit to the errors in the sheriff's description, viz: that Pigeonier and Perdido are different names for the same street, and that no such streets were in the suburb Lacourse where the sheriff

EASTERN DIS.
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had described the land as situated. By order of the court, the sheriff then amended his return on the execution and act of sale, by inserting "Girond street instead of Perdid, and faubourg St. Mary instead of faubourg Lacourse, in the description of the property sold."

Judgment was rendered for the plaintiff, and the defendant appealed.

MARTIN, J. delivered the opinion of the court.

The plaintiff is appellant from a judgment which refused him the rescission of the sale of a square of ground to the defendant, upon an execution issued on a judgment which she had obtained against him.

The rescission was claimed on the ground that she had before the sale received full payment of her demand, and on account of irregularities in the sale, a square in the faubourg St. Mary having been seized, and the sheriff having given a deed for a square in the faubourg Lacourse, and the deed having been afterwards amended by the order of the court, but not contradictorily with the present plaintiff, the then defendant in the execution.

Our attention has been called to a bill of exceptions taken by the plaintiff's counsel to the opinion of the court, on refusing him leave to prove, that although the judgment the present defendant had obtained, was for seven thousand six hundred and twelve dollars, there were due four thousand five hundred dollars only, the balance being a sum which she had promised to allow him, when she had received payment for a note of one Burgos to the plaintiff, and by him endorsed to her to secure the payment of a note of his on which she afterwards obtained judgment.

In an action to rescind the sale of property of a defendant in execution, seized and sold to satisfy the judgment, he will not be permitted to show payment of the demand on which the judgment was found-

As all this was prior to the judgment, she might and ought to have been pleaded in compensation, or otherwise, so as to render the amount of the judgment to the sum actually due, it not being pretended that the amount of Burgos' note, or any part thereof, was received by the present defendant since she obtained the judgment.

On the merits it did not appear to us the district judge erred in concluding that the present plaintiff had failed to establish that he had paid the judgment before the sale of the square took place.

The square claimed, and now in the possession of the defendant, is evidently one which was the plaintiff's property before the sale by the sheriff. It lies in the faubourg St. Mary. In the preamble of the deed, the sheriff states he has seized a square in the faubourg St. Mary. When he acknowledges the receipt of the price, he states that the square is in the faubourg *Lacourse*. When afterwards he makes the conveyance he alludes to the *above described premises*.

By this it is evident the square *seized* was alluded to. Three of the streets, which are said to form it, are streets of the faubourg St. Mary, and it is not pretended that any of the same name are in the faubourg *Lacourse*.

It is true, the plaintiff cannot be bound by the amendment, as it was made *ex parte*, but the original description, though faulty, appear to us sufficient to establish that the square siezed and sold, is the one now claimed.

It is also true, there is an evident error in the name of one of the streets, but the square being actually bound by three of the streets correctly named in the sheriff's deed, we must conclude, that the defendant acquired the square belonging to the plaintiff, lying in faubourg St. Mary, bounded by these streets. Such is the one now in her possession. If the plaintiff owned another square in that faubourg, bounded by the same streets, he might easily have administered evidence of the fact. In the absence of such evidence, it cannot be presumed he owned another, and if that be the case, the square now claimed must be the one that was sold.

Another irregularity is attempted to be shown in the number of the lots stated to be in the square sold, and these in the square and the number of these it actually contains. A square is a body certain, bounded by streets. Whatever space is contained in the square formed by the intersection of the streets passes by its sale.

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May, 1853.

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ed, previously to
its rendition.

The defendant in execution, whose property has been sold, and the sheriff's deed given, is not bound by a subsequent *ex parte* amendment of that deed.

The sale of a square passes a certain tract bounded by streets, and all the space which is included by the streets intersecting each other.

EASTERN DIS.
May, 1833.

DAVIS
VS.
FOSTER ET ALS.

The plaintiff has contended that he is not bound by the amendment which the court permitted the sheriff to make on the return of the deed, as they were made *ex parte*, and not contradictorily with him. We have disregarded the amendment, and have considered the return and deed in their original state.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

Preston, for plaintiff.

Peirce, for defendant.

DAVIS vs. FOSTER ET ALS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The Supreme Court will not disturb a verdict based on a fact, which by the evidence is doubtful.

The plaintiff, formerly master of the steam tow boat Porpoise, claimed from the owners the value of his services while on the boat, and those of his slave, and for disbursements made for the boat.

The defendants pleaded the general denial, and claimed in reconvention damages for the negligence of the plaintiff, while the Porpoise was towing the ship Helen Mar, for negligently permitting the ship to ground at the English Turn, on the right bank of the Mississippi river.

Judgment was rendered for the plaintiff, and the defendants appealed.

The opinion of the court, **MATHEWS, J.** absent, was delivered by **PORTER, J.**

This is an action to recover money due to the plaintiff for services rendered on board a steamboat, of which the defendants were owners, and for advances of money made for the use of the boat during the period of these services.

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May, 1833.

DAVIS
VS.
FOSTER ET AL.

The answer denies the indebtedness of the defendants, and avers that if any claim, such as that set up by the petitioner, should be proved against them, then they plead in reconvention and demand from the plaintiff the sum of four hundred and sixty dollars, a loss which they sustained in consequence of the unskilful and negligent conduct of the plaintiff while in command of their vessel.

The questions suggested by the record appear to us of fact alone. The negligence seems to be imputed on two grounds: First, that the captain was not on deck when the ship and the steamboat that towed her went ashore. Second, that there was a want of due caution in approaching so near the bank of the river at the place where the accident happened. It was at a spot where there is an eddy in the current, and the course of which varies much. On the first point we see no ground to fix the charge negligence on the captain. It is true he was not on the upper deck when the accident happened, but he had gone below, leaving the regular pilot belonging to the boat, at the helm, and we do not understand that it is the duty of masters of steamboats to remain constantly on deck. There may be places in the river where the navigation is so peculiarly dangerous, that an absence of the captain from that part of the vessel where he could direct her movements to meet contingent events, would perhaps justly expose him to the imputation of negligence. Whether this was such a place, or whether it was one that he might not have justly considered the ordinary skill of the pilot was adequate to, were questions submitted to the jury, and we are unable to say they erred.

On the other point, whether the steamboat did not approach too close to the shore, the evidence does not support so clearly the verdict. It leaves the question however doubtful, and it does not so preponderate on the part of the

EASTERN DISTRICT
May, 1833.

CARTER
VS.
COOPER.

The Supreme Court will not disturb a verdict based on a fact, which by the evidence is doubtful.

defendants, as to authorise the court to set aside the verdict of the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

Grymes, for appellants.

Preston, for appellee.

CARTER vs. COOPER.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The Supreme Court will remand a cause less readily on a question of fact, if a new trial was not moved for in the court below.

This was an action, brought by the vendee of a slave, warranted free from the vices and maladies prescribed by law, to recover the purchase money, on the ground that the slave was at the time of sale, afflicted with chronic diarrhœa.

The plaintiff had judgment, and the defendant appealed.

MARTIN, J. delivered the opinion of the court.

The plaintiff claims the return of the price of a slave sold to him by the defendant, on account of her being at the time of the sale, in the knowledge of the latter, afflicted with a chronic diarrhœa, of which she afterwards died, and of her being so much addicted to drunkenness, that the plaintiff would not have purchased her if he had known it.

The general issue was pleaded; there was a verdict and judgment for the plaintiff, and the defendant appealed, without having made any attempt to obtain a new trial.

EASTERN DIST.
May, 1833.CARTER
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COOPER.

His counsel has contended in this court, that there is no evidence on the record, that the slave was afflicted with any redhibitory malady or vice, before or at the time of the sale; that this evidence the plaintiff ought to have administered, and not having done so, he cannot recover. *Civil Code*, 2505.

The testimony shows the slave died shortly after the sale, of a diarrhoea; there is no evidence of her laboring under that malady at or before the sale, except the fact of her having been before that period, sick of a bowel complaint during four or five days. The period at which the disease, of which she died, manifested itself, is not correctly established. Two witnesses swear, it was two or three days after the sale and a number on the fourth day; a number of witnesses were heard; no question of law arose on the trial. The circumstance of the defendant having refrained from asking for a new trial below, and the parish judge having expressed his satisfaction of the correctness of the verdict, would render it more difficult to come to the conclusion, that the defendant ought to have the case sent back for a new trial, which is the utmost relief he could have at our hands. But we are unable to say, that the evidence does not preponderate in favor of the plaintiff.

The Supreme Court will remand a cause less readily on a question of fact, if a new trial was not moved for in the court below.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

Carleton, Lockett and Kelly, for appellant.

Preston, McCaleb and Gray, for appellee.

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May, 1833.

STONE ET AL.
VS.
CARTER.

STONE ET AL. vs. CARTER.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The 377th article of the *Code of Practice*, requires of the original plaintiff, an answer only, when the defendant institutes against him a separate and distinct action in the same court, and in such a case, the article provides that he shall not plead his non-residence to its jurisdiction.

Where the plaintiff had examined a witness, informed the court that he had closed his evidence, and the defendant had discharged one of his witnesses and read several depositions, held that the plaintiff might introduce another witness.

On a motion for a new trial on the ground of newly discovered evidence, the affidavit of the truth of the facts alleged, must be annexed to and filed with the motion.

If a vessel is anchored in a part of the port from which the law excludes her, another one is not thereby authorised to neglect the necessary precaution, to avoid coming in contact with the former.

The brig *Julia*, owned by the plaintiffs, laden and ready for sea, was anchored opposite to the steamboat landing, in the port of New-Orleans. At about eight o'clock in the evening, when her usual lights were hung out, the defendant's steamboat *Volant* came in contact with, and so much injured the brig, that she was compelled to unload her cargo and undergo expensive repairs. To recover the damage sustained by the owners of the brig, they brought this action.

The defendant pleaded the general issue, and claimed in reconvention, damages sustained by the steamboat, in consequence of the brig being anchored in that part of the river.

Judgment was rendered for the plaintiffs, and the defendant appealed.

The opinion of the court, MATHEWS, J. absent, was delivered by MARTIN, J.

The defendant is appellant from a judgment, which condemned him to pay the damages (alleged by the plaintiffs) to have been sustained by them, on account of a steamboat commanded by the defendant, having through his negligence and want of skill, run foul of their brig.

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May, 1853.

STONE ET AL.
VS.
CARTER.

His counsel has drawn our attention to two bills of exceptions.

The first is, to the opinion of the court who ordered the trial of the cause, notwithstanding his opposition on the ground, that it had been irregularly set down for trial, an issue not being formed on every part of the pleadings; as a demand in reconvention still remained without an answer or judgment by default being taken thereon.

His counsel has urged that the *Code of Practice*, 377, expressly provides, that the original plaintiff is bound to answer the demand in reconvention, and if there be any decisions of this court, which appear to dispense with this answer, they are anterior to the Code.

In the case of *Price vs. Millar*, 3 *Martin*, N. S. 363, the defendant objected to the plaintiff availing himself of an exception to the demand in reconvention, on the ground that he had not pleaded it. We said "our statutes, which regulate the mode litigants should pursue, on bringing their respective allegations before courts of justice, provide only for petitions and answers, and direct trial on them alone; the circumstance of matter being pleaded in avoidance has never been considered as offering an exception to this rule, and experience has satisfied us, that notwithstanding this mode of practice has sometimes enabled a party to surprise another, this inconvenience is nothing in comparison of that which would result from entangling suitors in the mazes of special pleading, and that the remedy by a new trial, affords sufficient relief to the surprised party."

This was indeed before the *Code of Practice*, but an examination of the whole article, partially quoted, has satisfied us that it has wrought no change in the anterior practice. This article offers to the original defendant, two distinct modes of placing his demand in reconvention before the court. He

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The 37th article of the *Code of Practice*, requires of the original plaintiff an answer only when the defendant institutes against him a separate and distinct action in the same court, and in such a case, the article provides that he shall not plead his non-residence to its jurisdiction.

may plead it as an exception in his answer, or he may institute a separate and distinct demand in the court in which he is sued. It is to this separate and distinct demand, which we understand the Code to require the original plaintiff to answer, without pleading to the jurisdiction of the court, that he is not domiciliated within its resort.

The same doctrine was recognised by this court, after the promulgation of the *Code of Practice*, in the case of *Suarez vs. Duralde*, 1 *La. Rep.* 166, where we held that it was recognised in that statute, which authorises the defendant to allege new facts in his answer, and to make an *incidental demand*, 328, in which case, they shall be considered or denied by the plaintiffs.

In the present case, the answer denies the want of the exercise of diligence and skill by the defendants, and avers that he is entitled to claim damages for the injury sustained in the steamboat, on the shock between her and the plaintiffs' brig, which was occasioned by the want of proper diligence and skill in the marks of the brig.

On this part of the case, we are of opinion, the District Court did not err in ordering the cause to be tried, although there was no answer to the reconvention.

The second bill of exceptions was taken to the examination of a witness of the plaintiffs, after their counsel had stated to the court, that he had closed his evidence, and after the defendant had discharged one of his witnesses and had read some depositions. The judge informs us that a subpoena had issued for this witness, who was not served therewith, but came into court before the defendant's counsel had closed his evidence.

The counsel of the defendant has contended, that although the opinion of the District Court may be supported by our decisions before the *Code of Practice*, that statute, 477, has a provision, with which these decisions are irreconcilable.

In the case of *Richardson vs. Dubois and al.*, 4 *Martin*, 129, at the January term of this court, in 1826, after the promulgation of this *Code of Practice*, we held that the lower court did not err in examining a witness who had been attached,

and who did not come into court until the evidence was closed on both sides. He had been summoned and attached by the defendant, and was offered by the plaintiffs. Although our decision took place after the promulgation of the Code, it is more than probable, the opinion of the lower court we examined, had been pronounced, before the promulgation of the *Code of Practice*.

That statute provides, that after the defendant has supported his defence by evidence, "the plaintiff may bring additional, or his former witnesses, to rebut the defendant's testimony, or to lessen its weight."

A posterior article, 484, provides, that "after both parties have produced their respective evidence, the argument commences, no witness then can be heard nor proof introduced, except with the consent of both parties."

The counsel of the defendant has contended, that the first of these articles authorising the plaintiff after the defendant has closed his evidence to introduce additional or his former witnesses, to rebut or lessen the weight of the defendant's evidence, is an affirmative provision, pregnant with the negative one, that the plaintiff shall not, at that period, introduce his former or additional witnesses, to *support* his demand, or in other words, his own evidence.

When the evidence of the defendant outweighs that of the plaintiff, its weight, *i. e.* its relative weight, may be lessened by taking some part of it therefrom, or by adding to that in the opposite scale. Every thing that supports a party's evidence, lessens, in the scale of justice, the weight of that of his adversary.

The article last cited, fixing the period at which no evidence can be received without the consent of both parties, is pregnant with the affirmative, that before that period arrives, the court may exercise its discretion.

In the case before us, it does not appear that the defendant's evidence was closed. We are, indeed, told, he had discharged a witness and read several depositions; *non constat* that he had no other witness to examine nor other depositions or any documents to read.

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Where the plaintiff had examined a witness, informed the court that he had closed his evidence, and the defendant had discharged one of his witnesses and read several depositions, held that the plaintiff might introduce another witness.

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We, therefore, conclude, the district judge did not err in permitting the plaintiff to examine his witness.

Lastly, the defendant's counsel has urged the District Court erred in declining to act on his motion for a new trial, on the ground of newly discovered evidence, because he had not in making it, filed the affidavit, which alone could authorise its reception.

The motion was made on the 13th of March, for a rule to show cause on the 16th; no affidavit was made or filed with the motion; but one was made and put on the file of the court on the return day.

The *Code of Practice*, 561, says, "if a new trial be prayed on account of newly discovered evidence, the party must, on *filing his motion*, annex to the same, his affidavit of the facts alleged in proof of his having discovered evidence material to his suit since the judgment, although he had used every diligence and effort in his power, to procure the necessary testimony. This affidavit must be filed on the record, in order that the adverse party may have communication of the same."

The intention of the legislature is frustrated when the party makes no affidavit, or when made, delays to enable his adversary to take communication of it, till the argument on return day. The law requires the affidavit to be annexed to and filed with the motion.

We, therefore, conclude, the District Court did not err in this respect.

On the merits, the counsel for the defendant has partly rested his defence on the circumstance of the brig at the time of the shock, being anchored in a part of the port of New-Orleans, exclusively appropriated for the anchorage of steam-boats, by an ordinance of the Corporation of the city of New-Orleans, and of the 23d of February, 1827, an act of assembly, by which the extent of the port includes the whole width of the Mississippi. The counsel of the plaintiffs has called to his aid, several acts of congress, particularly that authorising the people of the territory of Orleans, to form a constitution, and for the admission of Louisiana as a state in

On a motion for a new trial on the ground of newly discovered evidence, the affidavit of the truth of the facts alleged, must be annexed to, and filed with the motion.

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the union, by which the free use of the Mississippi is reserved to the people of the several states.

The circumstance of a vessel being anchored in a part of the port, from which the laws of the state and the ordinances of the corporation may exclude her, may authorise means to have her removed, or render her owner or master, obnoxious to penalties, but cannot authorise or justify the neglect of those precautions which people on board of other vessels are bound to take, in order to avoid running foul of her.

On the question of fact, it does not appear to us that the conclusion the District Court came to, demands our reversal of its judgment.

It is, therefore, ordered, adjudged, and decreed, that it be affirmed with costs.

Preston, for appellant. Strawbridge, contra.

CUCULLU vs. NEW-ORLEANS INSURANCE COMPANY.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A commission to examine a witness in a foreign country, will be granted on the affidavit of a disinterested person, to the materiality of the testimony.

This was an action brought upon a valued policy of insurance for the brig *Seraphim*, which was fired on and destroyed by the forts of Porto Bello, in the Republic of Colombia. The defence of the Company was, that she had on board a quantity of tobacco. This was alleged to be a contraband article, and to have occasioned the destruction of the vessel. The inferior court, having rejected parol evidence offered by the defendants that tobacco was contraband, after proof that

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If a vessel is anchored in a part of the port from which the law excludes her, another one is not thereby authorised to neglect the necessary precaution, to avoid coming in contact with the former.

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the laws in Columbia, as to such articles, had been printed and promulgated, decided that satisfactory evidence of the fact in dispute had not been produced, and accordingly rendered judgment in favor of the plaintiff. The defendants appealed.

Strawbridge, for appellants.

1. The court erred in refusing the commissions to Porto Bello, &c.
2. The court erred in over-ruling the testimony of V. de la Cova.
3. It erred in permitting plaintiff to give in evidence the loss at Porto Bello, under the allegations of the petition.
4. It erred on the merits, in deciding against the defendants, when judgment should have been for them.

Grymes and Slidell, contra.

The opinion of the court, MATHEWS, J. absent, was delivered by PORTER, J.

This action is brought on a policy of insurance, executed by the defendants on the brig *Seraphim*, for the space of twelve months, with the privilege during that time, for her to trade in the United States, the West Indies, Spanish Main, and the Gulf of Mexico. The policy contains a warranty by the insured against any charge, damage, or loss which may arise in consequence of having been engaged in illicit or prohibited trade at any time whatsoever.

The loss of the vessel occurred at Porto Bello, in the Spanish Main. The petition was filed on the third day of March, 1832. On the 26th of this month an answer was put in, and seven days after the defendants moved for a commission to examine witnesses, on the following affidavit:—
“A. St. Martin, secretary to the Orleans Insurance Company, being sworn, deposes, that the testimony of Manuel Antonio Pizarro, at Porto Bello, and other witnesses there residing, whose names are unknown to him, are material to

the defendants in the above suit; also that the testimony of witnesses residing at Kingston, Jamaica, whose names are unknown to him, is also material to the defendants in the above entitled suit."

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The first objection urged against the sufficiency of this affidavit is, that the names of the witnesses are not given in it. The name of one witness is stated, and the materiality of his testimony sworn to; so that admitting the objection taken to be sound, it does not apply to the instance before us.

But a more serious opposition has been offered on the ground, that the *declaration* has not been made by the party to the suit. It is contended that no one else can legally make the affidavit which the law requires in such a case.

Our Code of Practice, and the act of 1826, both of which contain provisions on this subject, do not state, with desirable clearness, by whom the oath respecting the materiality of absent witnesses should be taken, and were they considered without reference to the former practice, it is doubtful what construction should be put on them. Our first impression was, that previous to the Code of Practice, such an oath could only be made by a party to the suit, or by his agent appointed to carry it on; because in the assertion that the witness was material, there seemed to be involved a negation of the existence of other testimony within the party's knowledge and reach, by which the same fact could be established; and we were therefore inclined to think that the enactments in the Code, must be understood to be in conformity with the previously existing law. Since the argument, however, we have looked into the books on the subject of the affidavits required for continuances, and the granting of commissions to examine witnesses in foreign countries, and we find in that system of jurisprudence from which we obtained these proceedings, that, though the rule originally was, that the party in the cause must in all cases make the oath, and though the practice still is that he most usually makes it, yet the oath of disinterested witnesses will be received, when they take upon them to swear to the materiality of the testimony. Understanding the rule to be formerly

A commission to examine a witness in a foreign country will be granted on the affidavit of a disinterested person to the materiality of the testimony.

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in this way, we are bound to construe the doubtful enactment in our Code and act of the legislature, to be in conformity with it. It is not permitted to us to believe, that if a change had been intended, it would have been left to be inferred from language so equivocal. 2 *Johnson's Cases*, 60. 1 *Sellon's Practice*, 419. *Code Prac.* 436. *Act of 1826*, p.

This doctrine, we think, receives a most reasonable application to the case before us. It is contended that the oath of the president, or some one of the directors should have been offered. But on looking into the charter, we can find no more authority vested in any of them individually to make such an affidavit, than we do in the secretary. Corporations stand before courts of justice, in relation to matters of this kind, in a very peculiar situation, and a strict compliance with the rule as contended for by the appellee, could only be had by an act of the board of directors, appointing an agent to attend to the suit. This, so far as our knowledge extends, has never been required. Rules of practice, unless when they flow from positive legislation, are always tempered so as to enable courts to obtain, what above all things is the most important in the administration of justice, the truth in relation to the facts in controversy. We are bound to presume the witness in this case swore truly. It is possible the materiality of the testimony was known to him alone. It is probable, under the circumstances of the case, the value of the proof was *as well* known to him as to any other officer of the institution. In either hypothesis, the commission was properly asked for on his testimony.

It was lastly urged that the commission was correctly refused, because a copy of the affidavit was not served on the plaintiff. This irregularity, if it be one since the act of 1826, we think was cured by the defendants' calling on him to show cause why a commission should not issue on the affidavit filed, and by his appearing on this notice, and opposing the right of the defendants to obtain a commission on that affidavit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and

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reversed; and it is further ordered and decreed, that this cause be remanded to the Court of the first District, with directions to the judge not to refuse the defendants a commission to take testimony on the affidavit filed by them; and it is further ordered that the appellee pay the costs of this appeal.

EASTERN DIST.
May, 1888.
ALMON
vs.
FOX.

ALLISON vs. FOX.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

All the rules of evidence relative to a commencement in writing, which existed under the old Code, have been removed by the amendments to that work.

Parol evidence is inadmissible to give validity to an instrument, defective *per se*, which is offered to prove a sale of real property.

The plaintiff alleged that he authorised John Finck, to sell certain lots belonging to him, in the suburb Delor. That the defendant acceded to the proposals of his agent, and made with the latter a written agreement to that effect. The defendant afterwards refused to sign a public act of sale, according to the terms of this agreement, which was tendered to her. The plaintiff claimed general damages, and special damages for relinquishing certain stock in the Union Bank, in consequence of this agreement.

The defendant denied that she had entered into such an agreement, and alleged that the property in question was encumbered with mortgages, and for that reason the plaintiff could not have subscribed for the bank stock.

Judgment was rendered for the defendant, and the plaintiff appealed.

EASTERN DIS.
May, 1838.

Hennen, Barton and Maybin, for appellant.

ALLISON
vs.
FOX.

Sterrett, for appellee.

Preston, on the same side, made the following points.

1. Three circumstances concur to the perfection of the contract of sale; the thing sold, the price, and consent.—*Code, 2414.*

2. The contract of sale of land must be in writing, and the verbal sale of the same is null, even as to the contracting parties, and testimonial proof shall not be admitted. *Code, 2475.*

3. Parol evidence inadmissible against or beyond what is contained in the acts; or on what may have been said before, or at the time, or since. *Code, 2255 and 2256.*

4. The contract on the face of it, is a mere mandate and very informal.

5. He might as well write above Mrs. Fox's name, *I do not*, as *I do*, accept.

6. The objection to proving damages is, that they are claimed for a violation of a contract; then a *legal* contract must be first *legally* proved.

The opinion of the court, MATHEWS, J. absent, was delivered by PORTER, J.

The plaintiff sues, to compel the defendant to carry into effect a contract, which he avers she entered into with him for the purchase of certain lots in the suburb Delor. He asks also for damages in consequence of her refusal to comply with her agreement.

The answer denies the existence of any such agreement as that set out in the petition.

The plaintiff, in support of his allegations, introduced in evidence the following document:

"Mr. Finck,

EASTERN DIS.
May, 1832.

"Sir—You are authorised to close the sale with Madam Fox, for the annexed price and conditions; say twelve thousand dollars cash, in the following payments:

ALLISON
vs.
FOX.

"On the day of signing the bill of sale.....\$ 3,000

"do. do. one note, payable twelve months after date, with interest..... 3,000

"do. do. one note of \$3,000, with interest at 8 pr. ct. per annum, payable twenty-four months after date..... 3,480

"do. do. one note of \$3,000, bearing the same interest, payable thirty-six months after date..... 3,720

\$13,200

"Signed, John Allison.
L. Fox.

"New-Orleans, 6th August, 1832.

"Mr. A. to retain the premises, rent free, two months from sale."

On the trial, the plaintiff offered parol evidence to prove that the memorandum at the bottom of the agreement, was written by the agent of the defendant; that the premises described in the petition were those which the parties had contracted for; and that the defendant, subsequent to the signing of the instrument, claimed the said premises as her own. This testimony was objected to, and the court having sustained the objection, a bill of exceptions was taken by the plaintiff.

Under our old Code, this proof would have been admissible, but the amendments to that work have removed from it the whole of the rules of evidence relating to a commencement of proof in writing. To decide this case, therefore, we have to examine whether the instrument produced *per se* enables the petitioner to sustain his action; and if it does not, whether parol proof can be admitted to supply its defects.

All the rules of evidence relative to a commencement in writing, which existed under the old code, have been removed by the amendments to that work.

REASON. Dis.
May, 1838.

REASON
vs.
FOX.

Parol evidence is admissible to give validity to an instrument, defective *per se*, which is offered to prove a sale of real property.

On the first point, we think the instrument, if taken alone, does not sustain the action. It is a power of attorney from the plaintiff, authorising the agent to close a contract. It does not appear to have been closed, for no consideration is stated; and in order to the perfecting a sale, there must be a thing given, for the price received or promised to be paid.

If the document introduced, therefore, be not in itself a sale, and enable the plaintiff to recover, it is clear it cannot be made so by parol evidence; for our Code tells us in the most express terms, that testimonial proof of the sale of immoveable property shall not be received. *La. Code, 2255, 2416.*

This opinion renders it unnecessary to examine whether the court decided correctly in rejecting evidence that the memorandum which was written at the bottom of the agreement was in the hand writing of the agent of the defendant. Whether it was, or not, could not clear the case of the difficulty of the plaintiff being still under the necessity of proving the consideration by parol. There would be, perhaps, as much danger in receiving verbal proof of the thing which was sold, when the writing is ambiguous, as there would be in permitting proof of a sale, where there was no writing whatever. At all events, the law has considered so, by no longer giving any weight to a commencement of proof in writing.

This opinion renders it unnecessary to examine into the question, in relation to damages for a breach of contract. In order to show the breach, the contract must be proved; and if it cannot be proved, or, what is the same thing, not proved by legal evidence, there can be no longer a breach of it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

RABASSA vs. ORLEANS NAVIGATION COMPANY.

EASTERN DIST.
May, 1882.

APPEAL FROM THE COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

RABASSA
vs.
ORLEANS
NAVIGATION
COMPANY.

A verbal lease which is defective and inoperative in itself, may be confirmed or supplied by oral testimony, or may operate in conjunction with that part which is reduced to writing.

A corporation is civilly responsible for damages occasioned by an act done at its command by its agent, in relation to a matter within the scope of the objects for which it was incorporated.

A corporation is responsible for every injurious act on its part, from which the law has not specially exempted it.

Louis Allard, the lessor of the plaintiff, received from the Orleans Navigation Company, for the annual rent of three thousand one hundred dollars, a verbal lease of the turnpike road along the north western margin of the bayou St. John, from the Metairie road to lake Pontchartrain. Allard acquired the right to receive tolls on the road, as he alleged, according to the 13th section of the act of incorporation, by a written contract into which he entered with the Company. During the pendency of a suit by the Company against the plaintiff and Allard for the possession of the road, in which judgment was afterwards rendered in favor of the latter, the agents of the Company obstructed the road and rendered it impassable, causing damage to the plaintiff, amounting to the sum of four thousand dollars. For this the plaintiff brought this action.

The Navigation Company denied its liability for the alleged trespass, and the plaintiff's right to demand tolls upon the road, averring that it had been kept in so bad condition as to be unsafe and almost impassable.

Judgment was rendered for the plaintiff, and the Company appealed.

The opinion of the court, MATHEWS, J. absent, was delivered by PORTER J.

EASTERN DIS.
May, 1833.

BARASSA
VS.
ORLEANS
NAVIGATION
COMPANY.

The petitioner states, that he is the sublessee of the defendants of a road, on which, by virtue of the 13th section of the act incorporating the Orleans Navigation Company, tolls were receivable, that the Company through their agents have taken possession of the road, and by filling it up with soft marsh soil, have rendered it impassable. The damages sustained by the plaintiff from these acts, are averred to be five thousand dollars.

The answer denies the responsibility of the defendants for the acts alleged in the petition, and puts at issue the facts therein set forth.

The cause was submitted to a jury who found a verdict in favor of the plaintiff for sixteen hundred dollars. The defendants applied for a new trial, but the court rejected the application, and gave judgment in pursuance to the verdict. From this judgment the defendants have appealed.

A bill of exceptions was taken on the trial, to the introduction of parol proof on the part of the plaintiff that he had leased the road. The objection rests on the fact that at the time the lease was adjudicated, the conditions on which the road was let, had been reduced to writing, and announced to the lessee. And that the adjudication itself had been reduced to writing by the auctioneer. No written contract was however entered into, and signed by the parties. The plaintiff went into possession, and has since paid the rent to the lessors.

We do not think the court erred. This is not one of those cases where the law has constituted a written instrument the authentic and sole medium of proving the fact. Leases may either be verbal or written. In contracts of the former kind, instruments defective and inoperative in themselves, may be confirmed, or supported by oral testimony, or operate in conjunction with that part which is reduced to writing. The writings in question were not signed by the plaintiff, nor as far as we can learn ever seen by him. The lease was therefore, by parol. We are perfectly satisfied the plaintiff had the right to offer the evidence objected to. *Starkie on Evidence, p. 4, 1034.*

A verbal lease which is defective and inoperative in itself, may be confirmed or supplied by oral testimony, or may operate in conjunction with that part which is reduced to writing.

The main question in the cause relates to the responsibility of the defendants, for such an act of their agents as is alleged in the petition.

EASTERN DIS.
May, 1883.

RABASSA
VS.
ORLEANS
NAVIGATION
COMPANY.

The textual provisions of the Louisiana Code, are cited to show no such responsibility exists. A corporation (it is so enacted) cannot beat or be beaten in its corporate capacity; it cannot commit the crime of high treason, or any other crime or offence in its corporate capacity, and it can only contract through its agents. *La. Code. 428, 429, 432, 433.* Several references have been made to writers who treat of corporations as supporting the same doctrine, but it is unnecessary to cite them, for the general principle is no where more strongly stated than in the positive law of the state.

But it appears to us the rules just referred to leaves the question now before us entirely open. That question as we understand it is, whether corporations are not civilly responsible for damages occasioned by acts of their agents, in relation to matters coming within the scope of the object for which they were incorporated, when these acts were done by their command.

There can be little doubt the law should make them liable, and we think it does hold them so. The passages cited from our code, relate to crimes and offences, and as that work enumerates the cases where corporations are not responsible, and does not embrace within that enumeration non-responsibility in a civil action for injuries done to property, a very strong reason is offered to us against extending the exemption to a case not enumerated. The objection raised, that they are not responsible, because they can only contract through an agent, aids very little in the decision of the point now under consideration, for though they can only contract through an agent, it by no means follows, that they are not responsible for breaches of contract which they may have entered into, or for injuries which they may inflict on the property of others through their agents. If they rented a house and committed waste during the lease, or made themselves responsible by the non-performance of any obligation which the law imposes on the lessee, it can hardly be questioned they would be bound to make good the loss. If it be objected

A corporation is civilly responsible for damages occasioned by an act done at its command by its agent, in relation to a matter within the scope of the objects for which it was incorporated.

EASTERN DIS.
May, 1933.

HABASSA
vs.
ORLEANS
NAVIGATION
COMPANY.

A corporation
is responsible for
every injurious
act on its part,
from which the
law has not spe-
cially exempted
it.

that in the case last put, the responsibility grew out of a contract, we can hardly see how their liability would be varied, if without a contract, they entered on the property of another and used it for corporate purposes. Though corporate bodies can enjoy no rights, nor exercise any powers, but those conferred by law, we are not, therefore, authorised to conclude, that they are responsible for no acts but those which the law expressly declares they shall be responsible for. On the contrary, we think they are bound to others for every injurious act on their part, from which the law has not specially exempted them. No such exemption is shown here. The law of the Partidas, relied on, is no longer in force, and was not at the time this trespass was committed.

In England, by a statute of 21 *Edward IV.* it is holden, that a corporation cannot be beaten, nor beat, nor commit treason, nor felony, nor be imprisoned for disseizin with force, nor be outlawed. These enactments are much the same with these cited from our code, yet the books of adjudged cases in that country, and in our sister states, afford repeated examples of corporations being held liable for trespasses committed by their agents under their authority. Chancellor Kent says, they may be sued by a special action on the case for neglect, and breaches of duty, and in actions of trespass and trover for damages, resulting from trespasses and torts committed under their authority by their agents. 2 *Kent's Com.* 284. 3 *Peters* 398.

It is objected that there is no evidence on record, that the Navigation Company authorised the trespass, we think it results from the evidence of the defendants themselves, that they did authorise it.

The right of the lessors to interfere with the road, on the ground that it stood in need of repairs, was a question depending on the fact, whether the road did actually require the repairs or not, and that fact the jury has negatived by their verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court, be affirmed with costs.

Strawbridge, for appellants. *Preston*, for appellee.

THOMPSON vs. BLACKWELL.

EASTERN DIS.
May, 1823.THOMPSON
vs.
BLACKWELL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The incorporated limits of the city of New-Orleans, terminate at the edge of the Mississippi river.

In designating boundaries, the word *to*, if unaccompanied by the term *inclusive*, excludes the object *to* which the line runs.

This action was brought by the assignee of a bond for the prison limits of the city of New-Orleans, against the surety.

The defendant pleaded a general denial.

The record contains the following statement of facts, furnished to the court by the parties. "It is admitted that John Blackwell, the principal in the bond on which this suit is brought, went on board of a steamboat lying at the wharf, and in contact therewith, but floating on the river Mississippi, subsequent to the signing of said bond. It is also admitted that the defendant signed the bond sued on, and that said bond was regularly transferred to the plaintiff, and that in case the plaintiff is entitled to recover, the amount claimed in the petition is correct."

On this statement the cause was submitted. Judgment was rendered for the plaintiff and the defendant appealed.

Hoffman and Hill, for appellant.

Roselius, contra, contended that:

1. The breach of the conditions of the bond on which this suit is brought, is shown by the admissions on record. The prison limits are established with those of the city of New-Orleans. *Act of 1823, Moreau's Dig. vol.1, p. 575.* The limits of the city extend to the river Mississippi. *Act of 1812. Moreau's Dig. vol. 2, p. 118.*

2. If the expressions of this law are at all doubtful, they have been interpreted by the legislature. The law creating

EASTERN DIS.
May, 1833.

THOMPSON
vs.
BLACKWELL.

the City Court of New-Orleans, gave that court jurisdiction within the limits of the city, and by a subsequent act its jurisdiction was extended over the whole breadth of the river. *Moreau's Dig. vol. 1. p. 344; lb. 358-9.*

3. The appellee is entitled to ten per centum damages for a frivolous appeal.

The opinion of the court, MATHEWS, J. absent, was delivered by PORTER, J.

This is an action against the surety of a debtor who gave bond to keep within the prison bounds of the parish and city of New-Orleans. These bounds according to the act of March 9, 1823, are the whole incorporated limits of the city of New-Orleans. See 1 *Moreau's Dig.* 575.

The breach charged is, that the principal went on board a steamboat afloat in the Mississippi, but which was attached to one of the wharves created by the corporation, within the port of New-Orleans.

The original act of incorporation gave for limits to the city a tract of country from one point to another, beginning at lake Pontchartrain, the lines which close are described as running to the *Mississippi*. The act of 1812, which enlarges these limits, in laying off the wards, it appears to us also gives the same boundaries, for it says the lines which divide them shall commence on the levee; it declares that the parallel lines which close them shall run to the *Mississippi*.

The incorporated limits of the city of New-Orleans, terminate at the edge of the Mississippi river.

So that the question is, whether the incorporated limits of the city of New-Orleans, terminate at the edge of the water, or extend to and embrace a portion of the river, which will bring a steamboat lying at the wharf within these limits.

The judge of the first instance decided this question in the negative, and the defendant appealed.

The judge below decided correctly. The word *to* may it is true be either inclusive, or exclusive, according to the subject matter. In designating boundaries, it is always understood if unaccompanied by the term *inclusive*, to exclude the

In designating boundaries the word *to* if unaccompanied by the term *inclusive* excludes the object to which the line runs.

object the line is to run *to*. It was no doubt an omission on the part of the legislature not to embrace the port within the incorporated limits; but courts of justice cannot supply the omission. We have a strong legislative construction of the acts defining the limits of the city which we cannot safely disregard. By an act of February 10, 1821, the port of New-Orleans has certain limits given to it, and it is declared that between the points designated, the port shall include the whole width of the river.

EASTERN DIS.
May, 1833.

THOMPSON
VS.
BLACKWELL

The second section of the act proceeds and enacts, that the police officers and justices of the peace of New-Orleans shall have the same jurisdiction over the port which they now enjoy by law *within the city of New-Orleans*. This act appears to contemplate, that it was necessary to give by law jurisdiction over the port to the city officers. It was clearly unnecessary if the port was already within the incorporated limits. Nor is this provision satisfactorily explained by supposing the city as incorporated, extended over the half of the river, and it was requisite its jurisdiction should be carried over the whole width of the river. It speaks of the whole port, provides for the whole, and it is evidently bottomed on the understanding of that branch of the government, that it was requisite to extend the jurisdiction of the corporation over the whole river, not the one-half of it. This construction is strengthened when we find the legislature give to the city magistrates the same jurisdiction over the port which they now enjoy *within the city*. What is this but saying, that the port was *not* within the incorporated limits of the city? They give the jurisdiction over one place, which is now enjoyed over another.

The rule which makes the middle of a river the dividing line between independent states, where territories lie on each side of it, and the principle that countries lying on a river have the same limits cannot be accurately assimilated to the case before us. The one rests on principle of international law. The other, supposing it sound, and its correctness might be well doubted in a case where the line designated would be declared to run *to* the river, rests on the presumption that

EASTERN DISTRICT
May, 1833.

SWINDLER
VS.
PEYROUX ET AL

it was not the intention of the law maker to exclude any part of the state from its judicial division, so as to afford an immunity for crimes and offences. But no such necessity exists here for the parish divisions would have effected this object. The limits of corporations are the creatures of positive legislation, and cannot be extended by implication and motives of convenience.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

SWINDLER vs. PEYROUX ET AL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE THEREOF
PRESIDING.

The presence of a child of the deceased, is not inconsistent with the administration of the estate by a curator.

A sale of real property, as a part of a vacant estate, by order of the Court of Probates, discharges all mortgages upon it granted by the deceased owner, but does not affect those with which the property was encumbered at the time he purchased it.

The plaintiff was the widow of Dorsey P. Swindler, against whose estate she had recovered a judgment in the Court of Probates, for her dotal and paraphernal property, amounting to four thousand two hundred and eighty-nine dollars and sixteen cents. The claim of their daughter for her property, entrusted to him as her natural tutor, was allowed in the same court, amounting to nine thousand six

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hundred and thirteen dollars and fifteen cents. This claim had, by public act, been transferred to the plaintiff.

EASTERN DIST.
May, 1833.

Several slaves were subsequently purchased by the plaintiff, in part payment of her claims, at a sale of Swindler's succession, made by order of the Court of Probates.

SWINDLER
VS.
PETROUSE
ET AL.

The defendants, averring they had a mortgage on the slaves, obtained from the Court of the Third Judicial District, an order of seizure and sale against them. To stay all proceedings on this order, the plaintiff sued out an injunction, which was dissolved, and while a motion for a new trial was pending and undecided, the defendants advertised the slaves for sale under this order.

The plaintiff then filed her petition, setting out her claims, and succeeded in obtaining a second injunction.

The defendants pleaded to the allegations of her petition, a general denial, and moved to dissolve the injunction, with costs and damages.

Judgment was rendered for the defendants, and the plaintiff appealed.

The opinion of the court, MATHEWS, J. absent, was delivered by MARTIN, J.

The plaintiff is appellant from a judgment which dissolved an injunction which she had obtained to prevent the sale of certain slaves in her possession, under an order of seizure and sale procured by the defendants.

The facts of the case are these. Her late husband and Lafeton purchased a plantation and twenty-seven slaves in partnership, for cash. He afterwards made three promissory notes to the order of Lafeton, who endorsed them; they were delivered to the defendants, and the maker and endorser joined in a mortgage of thirteen of the above slaves, to secure the payment of the notes. Afterwards, all or part of the remaining slaves not mortgaged to the defendants, being mortgaged to other creditors, a division of the whole was made, and nine of those mortgaged to the defendants fell to the share of the plaintiff's husband, on an agreement that each

EASTERN DIS.
May, 1833.

SWINDLER
VS.
PETROUX
ET AL.

of the partitioners should pay the debts for which the slaves which fell to their respective shares, were mortgaged. After this, the plaintiff became a widow, and renounced the community; the estate was administered by a curator, and she purchased eight of the slaves mortgaged to the defendants, in the lot of her husband, at the sale of the Court of Probates.

She resists the defendants' attempt to have them sold to satisfy their mortgage, on the ground that it was purchased by the probate sale, and they ought to have exercised their rights in the proceeds of the sale in the Court of Probates; and on the ground of a higher lien in her, for the security of her claim against her husband's estate for her dotal and paraphernal property, and as assignee of a daughter of her husband, for a privileged claim against him as her tutor.

The counsel of the defendants has chiefly confined his efforts to oppugn the doctrine which our learned brother has taken as the basis of his decision, viz: that a sale by a Court of Probates of the property of a vacant estate, transfers it to the vendee free from any mortgage or privilege with which the deceased has encumbered it; that the case of *De Ende vs. Moore*, which is usually cited in support of this doctrine, has ceased to be law under the existing legislation.

He has next contended, the estate was not a vacant one, since it appears the deceased left a daughter, as the assignee of whom the plaintiff sets up a claim, and if, therefore, the estate is not a vacant one, the Court of Probates was without authority to order a sale.

It has appeared to us, there is not any thing in the *Louisiana Code* or *Code of Practice*, in any way militating against any of the provisions of the Code of 1808, on which, the counsel concludes, our decision in *De Ende's* case was bottomed. He has referred us to the *Louisiana Code*, 1154-8, 1176, 3341-8; to the *Code of Practice*, 61 and *seq.* to 2 *Moreau's Digest* 433; 3 *Martin, N. S.* 604, and *id.* 581.

The presence of a child of the deceased, is not inconsistent with the administration of the estate by a curator.

The presence of a daughter of the deceased is not inconsistent with the administration of the estate by a curator; especially when she is a creditor, and the widow has renounc-

ed the community, for the daughter may have declined becoming an heir.

EASTERN DIS.
May, 1833.

The appellant's counsel, complains that the claim of a mortgage of the defendants has been sustained as to one undivided half of the slaves. In this, it does not appear to us, the court erred. The deceased, when he executed the mortgage sent to the defendants, jointly with Lafeton, was himself the owner of one half of them only—the other half was Lafeton's. It is true he afterwards acquired this latter half by a contract of purchase or exchange; parting, in favor of Lafeton, with his undivided half of other slaves. But this acquisition was made *cum onere*; the undivided half that had belonged to Lafeton, was in the hands of the plaintiff's husband, burthened with this mortgage to the defendants, which nothing has destroyed. The sale by the Court of Probates purged, indeed, the mortgage the deceased had encumbered it with, but it did not purge those with which the property had, before it became Swindler's, been encumbered by anterior owners. For these the property is still bound.

A sale of real property, as a part of a vacant estate, by order of the Court of Probates, discharges all mortgages upon it granted by the deceased owner, but does not affect those with which the property was encumbered when he purchased it.

The judgment dissolved the injunction, and orders the sale of the whole of the slaves, and directs one half the net proceeds to be paid to the defendants, and the other to the plaintiff. It has not been made a question, before us, nor (as far as it appears) in the lower court, whether the plaintiff, by her purchase, did not acquire an indefeasible title to one undivided moiety of the slaves, and whether she was not entitled to demand it, in kind, by a partition; we have not, therefore, examined this point.

As to the alleged prior claim of the plaintiff, in her own right and that of her step-daughter, for dotal or paraphernal or minor's claims, it has appeared to us, the district judge correctly concluded the defendants' mortgage was prior in time, and consequently *potior in jure*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Labauve, for appellant. Burke and Davis, contra.

EASTERN DIS.
May, 1833.

MERCIER,
ATTORNEY ETC
vs.
STERLIN,
DATIVE EX'R.
ETC.

MERCIER, ATTORNEY FOR THE ABSENT HEIRS, &c. vs. STERLIN
DATIVE EX'R., &c.

APPEAL FROM THE COURT OF PROBATES OF THE PARISH AND CITY OF
NEW-ORLEANS.

The illegal possession by a third person of a succession, does not prevent the Court of Probates from taking the necessary steps to have the estate duly administered.

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The plea of *res judicata* cannot be sustained, where one of the parties appeared in a different capacity in the former suit.

The power of the attorney for the absent heirs to act, commences with the date of his appointment.

The dative executor cannot confirm a sale which is not legally made, nor dispose of the effects of the estate by private agreement.

On the 22d of March last, on motion of the attorney appointed by the court to represent the absent heirs of Philip Sterlin, deceased, the dative executor was ruled to show cause why the real estate of the deceased, situated in the parish of Jefferson, should not be resold by the Register of Wills. Sterlin had made two wills; the execution of one of them had been ordered by the Court of Probates. This will was subsequently annulled, and the other confirmed by a final judgment of this court. *Vide ante*, 100.

The executor, and Daniel T. Walden, the alleged, purchaser of a lot of land belonging to the estate of the deceased, showed cause against this rule, upon several grounds which, with the other proceedings, are fully stated in the opinion of the court.

The rule was made absolute, and the executor appealed.

The opinion of the court, MATHEWS, J. absent, was delivered by PORTER, J.

The testator made two wills. One of them was admitted to probate, and its execution ordered. The executor, in pursuance of this order, proceeded to sell the effects of the estate, but the purchasers did not comply with the conditions on which the property was adjudicated to them; no re-sale, however, was ordered, and things stood in this situation, when a judgment of this tribunal set aside the will which had been admitted to probate, and ordered the execution of one which had previously been made by the testator.

EASTERN DIS.
May, 1833.

MERCER,
ATTORNEY ETC
VS.
STEWART,
DATIVE EX'R.
ETC.

The executor named in the will last mentioned refused to act, and a dative executor was appointed. His proceedings in relation to the property which had been adjudicated to certain persons and not paid for, has caused the litigation which has brought the present cause before this court.

Among the purchasers at the sale made by order of the Court of Probates, was one R. C. Hall. The sale took place on the 27th March, 1832. Proceedings were carried on as far as a writ of distringas, to make him carry his contract into effect, but without any useful result being attained. The sheriff returned that he could find no property on which the writ could operate.

The executor of the first will which was admitted to probate, endeavored to cause a resale of the property. This was opposed by the new dative executor in his then capacity of heir, and the court decided that the property could not be sold, as the executor had required.

Shortly after the dative executor received his appointment, he ratified and confirmed all the sales which had been made by the executor of the annulled will, and in this act, it is specially recited, that as the property which had been adjudged to Robert C. Hall, was, in reality purchased, for account of Daniel F. Walden, and that said Hall is since deceased, without having performed or fulfilled any of the obligations of said sale, or paid any part of the price; he therefore consents that Walden shall be considered as the original and *bona fide* proprietor, and regarded as the person to whom the property was adjudged.

EASTERN DIS.
May, 1833.

MERCIER,
ATTORNEY ETC

VS.

STERLIN,
DATIVE EX'R.
ETC.

The attorney for the absent heirs next took a rule on the dative executor, to show cause why the real estate left by the deceased, should not be sold again by the Register of Wills. To this rule, Walden was made a party.

Walden denied the jurisdiction of the Court of Probates and was dismissed. The executor has shown various causes why the rule should not be made absolute.

1. The dative executor cannot comply with the order demanded, because the property is in possession of a third person, not subject to the jurisdiction of the Probate Court.

2. The case was adjudged 25th August, 1832, and that judgment formed *res judicata*.

3. The attorney for the absent heirs cannot take such a step without proving there are such in existence.

4. The dative executor is the heir.

5. The property would not sell for near its value, as the buyer would acquire nothing but an expensive lawsuit with the party in possession, under the first sale.

The illegal possession by a third person of a succession, does not prevent the Court of Probates from taking the necessary steps to have the estate duly administered.

The plea of *res judicata* cannot be sustained, where one of the parties appeared in a different capacity in the former suit.

The power of the attorney for the absent heirs to act, commences with the date of his appointment.

The dative executor cannot confirm a sale which is not legally made, nor dispose of the effects of the estate by private agreement.

On the first point, we are of opinion, that the circumstance of the property being in the hands of a third person, if it be illegally in his possession, does not prevent the Court of Probates from taking such steps as will enable the estate to be duly administered.

On the second point, we think that the judgment referred to, does not form the plea of *res judicata*, for the decision there was not between the same parties. There, it was the former executor who contested the case with the present defendant, who did not appear in the same capacity he does now.

3. We think the attorney for the absent heirs could properly take such a rule. It is his duty to see that the estate is legally administered, and his right to act commences with the date of his appointment, and is not contingent and in abeyance, until it is discovered there are heirs in existence.

4. It does not appear to us the judge erred. Hall had died without complying with his contract, and could not have claimed the property. The act was never signed by him. Not being the owner of the property, it is not seen by us how he

could transfer that property to a third person. The dative executor has no power to dispose of the effects of the estate by private agreement, or to confirm any sale which was not legally made.

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5. The price which the property may sell for, cannot influence our judgment on the law. It is proved, however, that the land has greatly increased in value, and may be presumed the sacrifice will not be so great as seems to be apprehended.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the Probate Court be affirmed with costs.

Preston, for appellant. *D. Seghers*, for appellee.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A judgment for a delivery of a thing which has no existence, is not changed by a decree directing the payment of its value.

The defendants had in another suit brought by the plaintiff, obtained a judgment against him for three thousand seven hundred and twenty-three dollars and eighty-three cents, with the condition that the defendants should restore two steam engines to the plaintiff made by him for them, of which one had been destroyed before the rendition of the judgment. Vide 2 *La. Reports*, 382. The plaintiff prayed in this suit for a decree setting aside the execution issued in the former one, and for damages. An injunction was granted staying the sale of a house and lot of plaintiff seized on the execution.

The defendants pleaded the general denial, and alleged that the engine which was destroyed, had never been the

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plaintiff's property, nor ever had been claimed by him; that the other engine had been seized on their execution; that it was to be sold, and its proceeds applied to satisfy their judgment.

The judge *a quo* dissolved the injunction, and decreed that the plaintiff should be credited with the value of the engine, estimated at the time it was made. The plaintiff appealed.

The opinion of the court, MATHEWS, J. absent, was delivered by PORTER, J.

The litigation between these parties grew out of a contract by which the plaintiff was to superintend the making of a steam engine for the defendants. The former claimed his wages, and the latter damages from him in consequence of his neglect or want of skill.

On the first trial in the District Court, judgment was rendered in favor of the plaintiff for six hundred and four dollars and sixty-nine cents; and the court further averred, that a small engine which he had delivered in pledge to the defendants should be restored to him.

The judge of the first instance had reached the conclusion just stated by disallowing the defendants' claim in remuneration. On appeal, this court thought he erred in doing so, and they ordered the cause to be remanded in order that the amount to which they were entitled under it should be ascertained.

On the second trial, the District Court gave judgment in favor of the defendants under their claim in remuneration, for the sum of five thousand four hundred and thirty-eight dollars and two cents; and further ordered, that the engine which the plaintiff had defectively made should be restored to him.

From this judgment the plaintiff appealed, and alleged various errors in it. The appellees contented themselves by asking for its confirmation, though the judge had decreed that they should return an object which had already been broken up and destroyed.

The Appellate Court being thus confined by the pleadings to an examination of that part of the judgment of which the plaintiff complained, directed its attention alone to the amount allowed for damages on the plea in reconvention, and left the other part of the decree unaltered.

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The judgment rendered by this tribunal was in these words: "That the defendants have judgment for three thousand seven hundred and twenty-three dollars and eighty-three cents, and that they restore to the plaintiff the defective engine, and a smaller one which they received in pledge."

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Execution issued against the plaintiff for the amount thus adjudged to be due by him; upon which he applied for an injunction on the grounds that the defendants could not enforce that part of the decree which was in their favor, without performing the obligations it imposed on them.

The court below decided, that as the engine was no longer in existence, it was sufficient if the defendants gave credit for the value of it. The plaintiff appealed.

That part of the judgment which condemns the plaintiff to pay a sum of money is absolute, and the right of the defendants to issue execution on it is not made to depend on their first delivering the engines. The plaintiff, however, might have enforced the performance, if it were possible, by a writ of distringas. As the whole case is, however, now before us, that may be done which the court would do if the last mentioned writ had issued, and a specific performance had become impossible. The value in money which represents the thing would be taken, in place of that which no longer exists.

The judge, therefore, in our opinion, did not err in deducting the value of the engine which the defendants could not deliver. In rendering this decree, he by no means changed the judgment already rendered. He did nothing more than carry it into execution, as far as it was possible.

A judgment for the delivery of a thing which has no existence is not changed by a decree directing the payment of its value.

The value of the engine at the time the court decreed it to be rendered up, and not that at the time it was new, was the proper measure of the deduction from the judgment which the defendants had recovered.

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The small engine which yet exists *in specie* must be returned.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; and it is further ordered, adjudged and decreed, that the judgment rendered in the case against the plaintiff, be credited with the sum of four hundred and eighty-eight dollars and thirty-four cents; but that no execution issue on the same until the defendants restore to the plaintiff the small engine which they received in pledge; and it is further ordered, that the appellees pay costs in both courts.

Preston, for appellant.

Carleton and Lockett, for appellees.

ALLAIN vs. PRESTON ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If the clerk certifies that the record "contains a transcript of all the proceedings on which the cause was tried," but no evidence appears to have been taken in writing at the trial, and there is no statement of facts, no bill of exceptions, case agreed on, allegation of error apparent on the record, or certificate of the judge, the Supreme Court cannot examine the correctness of the decree of the judge *a quo*.

This case comes before this court on the third appeal. For a statement of facts, and the proceedings had previous to this appeal, see 2 *La. Rep.* 39, 4 *ib.* 13. The record for this appeal contained the last decree of this court, dated 15th

January, 1833, remanding the cause for want of a *contestatio litis* on the merits; the judgment of the inferior court for the plaintiff signed 15th of February following; the defendants petition of appeal; the order, bond, and clerk's certificate.

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Morphy, for appellant.

1. A personal obligation is valid even when the obligee shows no interest in the performance of the principal obligation, or suffers no damage from its in-execution. See *Toullier*, 6 vol. p. 853, and following nos. 813, 817.

2. The art. 2121 of the *Louisiana Code*, applies only to penal obligations attached to a principal obligation, susceptible of being enforced by action, and which are stipulated to determine the quantum of damages which may be claimed in case of its in-execution. *Toullier*, 6 vol. p. 841, nos. 808, 812. *La. Code*, arts. 2120, 2121.

3. Under a lease for years, the rents becoming due may be granted from the inception of the suit, up to the day of the judgment rescinding the lease.

Preston, for appellees.

MARTIN, J. delivered the opinion of the court.

We learn from the clerk's certificate, that the sheets preceeding it "contain a transcript of all the proceedings on which the cause was tried, since the last appeal, with the exceptions of the transcripts of the two former appeals, which are already in the Supreme Court."

There is no statement of the facts, no evidence appears to have been taken down during the trial, there is no bill of exceptions, case agreed, or allegation of any error apparent on the face of the record, nor any certificate of the judge.

We have not examined the transcripts in the two preceding appeals, because, admitting that they contain a legal statement of the evidence theretofore given, nothing can authorise us to assume that the third trial was had upon the

If the clerk certifies that the record "contains a transcript of all the proceedings on which the cause was tried," but no evidence appears to have been taken in writing at the trial, and there is no statement of facts, no bill of exceptions, case agreed on, allegations of

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error apparent on the record, or certificate of the judge; the Supreme Court cannot examine the correctness of the decree of the judge *a quo*.

same evidence, as was adduced during the two preceding trials, and no other.

Nothing enabling us to know what are the facts of the case, we are unable to inquire into the correctness of the judgment.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed at the appellant's costs.

SENAC vs. PRITCHARD.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

The provisions contained in the 2267th and 2269th articles of the *Louisiana Code*, relate to cases where the lessee is not in fault, and cannot be extended to a case where he violates the contract.

An absence of proof of an unnecessary averment in the petition does not defeat the plaintiff's right of action.

Payment by a lessee does not affect his right to avoid the lease because certain stipulated repairs have not been made on the premises.

This cause came on to be heard on a second appeal. The petition states that the plaintiff with his family removed into a house of the defendant who promised to repair the apartments and out houses, and fit the premises so as to make a comfortable residence, and that he had not complied with that promise.

The lease signed by the parties in their own words, "Witnesseth, that Richard O. Pritchard hath and doth hereby let unto the said Doctor Senac, the dwelling situate on Bien-ville-street, for the term of one year, to begin on the first

day of December, 1830, and to end on the first day of December, 1831, for the sum of eight hundred and forty dollars payable monthly." EASTERN DIST.
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The plaintiff continued to reside in the house until January, 1831, when a partition wall having been prostrated by a storm, and the defendant refusing to repair it, and the house being in an untenable condition, he removed.

The defendant denied the allegations of the petition. The jury having found a verdict in his favor, and judgment having been accordingly rendered, the plaintiff appealed.

This court remanded the cause to be tried *de novo*, for reasons stated in its opinion. Vide *2 La. Rep.* 160.

On the second trial, judgment was rendered for the plaintiff for one hundred and fifty dollars. The defendant appealed.

PORTER, J. delivered the opinion of the court.

This action is brought by the lessee against the lessor to obtain the rescission of a contract of lease, on the allegation, that the tenement is not habitable for want of repairs which the defendant should make, and which he promised to make. Damages are claimed for the breach of the contract. The petition also charges that the plaintiff has paid all but a small portion of the rent, and that he is willing to pay that.

The cause was submitted to a jury in the court of the first instance, who found that the facts authorised a dissolution of the lease, and assessed the plaintiff's damages at one hundred and fifty dollars.

The court after rejecting an application for a new trial, gave judgment in conformity with the verdict, and the defendant appealed.

The facts we think fully justify the conclusion to which the jury came as to the right of the plaintiff to have the lease annulled. The amount of damages was a matter of which they were better judges than we are, though we have a controlling power over them even on that matter, when their conclusions are directly and plainly opposed to the weight of

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The provisions contained in the 2367th and 2269th articles of the La. Code, relate to cases where the lessor is not in fault, and cannot be extended to a case where he violates the contract.

An absence of proof of an unnecessary averment in the petition does not defeat the plaintiff's right of action.

Payment by a lessee does not affect his right to avoid the lease because certain stipulated repairs have not been made on the premises.

evidence. Such, however, is not the case here. We have been referred to article 2667 and 2269 of the *La. Code*, to show that damages are not due in a case like this. The provisions contained in these articles relate to causes where the lessor is not in fault, they are exceptions to the general principle. And there is no ground whatever for extending the rules laid down by them to cases where the lessor violates his contract. It was argued that the plaintiff had averred in the petition that he had paid the rent up to a particular time, and that there is no proof to be found of his having done so. The plaintiff need not have stated this, and the want of proof in support of it cannot defeat his action. The entry on premises under a contract of lease, and the remaining in possession under a promise that they shall be put in repair, does not prevent the lessee from avoiding the lease when he finds these repairs will not be made. Payment or non-payment of the rent cannot affect this right, unless so far as the fact of paying rent is some evidence that the property was worth, even in the state the lessee held it, the sum stipulated for its use. The benefit of that presumption the defendant had under the pleadings.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

Eustis and Sterrett, for appellant.

Schmidt, for appellee.